SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

No. 312

CHARLES L. DOUGLAS, Petitioner,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH DISTRICT, AND BRIEF IN SUPPORT THEREOF.

THOMAS J. O'NEILL,
Counsel for Petitioner.

CHARLES D. LEWIS,
JOHN AMBROSE GOODWIN,
LEONARD F. FISH,
Of Counsel.

(33,821)

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SUPREME COURT OF THE UNITED STATES.

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CHARLES L. DOUGLAS, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE SUPREME COURT:

The petition of Charles L. Douglas respectfully shows to this Honorable Court:

Summary Statement of Matter Involved.

On the 31st day of December, 1927, an action was commenced in the Supreme Court of the State of New York, Westchester County, pursuant to the Federal Employers' Liability Act of 1908 (35 Stat., 65), as amended by Laws of 1910 (Chap. 143, Sec. 1, 36 Stat., 291), to recover damages for personal injuries to plaintiff.

Plaintiff on December 1, 1927, was injured while in the employ of defendant, while both were engaged in an interstate commerce movement at Waterbury, Connecticut.

Plaintiff is a citizen of the United States and a citizen and resident of the State of Connecticut and that defendant is a foreign Connecticut State railroad corporation doing business and operating a railroad in the counties of Westchester, Bronx and New York, within the State of New York.

On the 9th day of January, 1928, the Special Term of the Supreme Court made and entered its order vacating the service of the summons and complaint and dismissing the action, upon the ground that the jurisdiction of the court in such a case was discretionary and not a matter of right and that plaintiff should be remitted to another forum. Thereafter and on the 21st day of March, 1928, such order was unanimously affirmed by the appellate division and a judgment was entered upon its remittitur. Thereafter and on the 29th day of May, 1928, the order and judgment of the appellate division, unanimously affirming the order of special term, was unanimously affirmed by the Court of Appeals of the State of New York.

Reasons Relied on for the Allowance of the Writ.

The Court of Appeals of the State of New York has finally determined that the laws of the United States (Federal Employers' Liability Act) are to be enforced in the State of New York as a matter of judicial courtesy and not a matter of right.

> "We conclude that a litigant who brings his action under the Federal Employers' Liability Act stands before the Court in no different attitude than a litigant who brings his action under the statute of a sister State."

(Murnan *vs.* Wabash Railway Co., 246 N. Y., 244, reversing 220 App. Div., 218, where the appellate division by a three to two vote based on the opinion of this Court (Mondou *vs.* N. Y., N. H. & H. R. R. Co., 223 U. S., 1) held to the contrary. This theory is also contrary to the law as expressed by the Federal courts (Murray *vs.* Chicago and N. W. Ry. Co., 62 Fed. Rep., 24).

The Court of Appeals of the State of New York has finally determined that citizens of the several States of the United States are not entitled as of right to maintain an action that a resident of the State of New York is entitled to maintain as of right in the courts of the State of New York upon a like cause of action, contrary to the opinions of the highest State Courts of Louisiana and Minnesota on the same question (State *ex rel.* Watkins *vs.* North American Land & Timber Co., 106 Louisiana, 621, 87 Amer. State Reports, 309, and State *ex rel.* Prall *vs.* District Court of Waseca County, 126 Minn., 501; and also to the dictum of Mr. Chief Justice Taft in Missouri Pacific R. R. Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533).

The Court of Appeals of the State of New York has decided in substance Federal questions of substance, to wit:

(1) Does Section 2 of Article 4 and the second clause of Article 6 of the United States Constitution require the New York State courts to entertain jurisdiction of an action of an injured railroad employee, who is a citizen and resident of Connecticut, against a Connecticut State railroad corporation doing business and operating a railroad in the State of New York, where the State courts of New York allow citizens of New York as a matter of right to sue said foreign corporation, doing business in the State of New York, upon a similar cause of action?

and

(2) Does the Federal Employers' Liability Act require as a matter of right the courts of New York to entertain jurisdiction of an action by an injured railroad employee, and a citizen and resident of the State of Connecticut, against a foreign corporation interstate commerce railroad common carrier doing business in the State of New York, in a way probably not in accord with possible applicable decisions of this Court, and that this Court has not directly heretofore determined these questions (Mondou *vs.* New York, New Haven & Hartford Railroad Co., 223 U. S., 1; Missouri *et al. vs.* Taylor, 266 U. S., 200; Missouri Pacific R. R. Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533; Gile *vs.* Cunningham, 133 U. S., 107; Chambers *vs.* B. & O. R. R. Co., 207 U. S., 142; State *ex rel.* Prall *vs.* The District Court of Waseca County, 126 Minn., 501).

The questions involved in this case are of great public interest to the thousands of railroad employees,

their widows and children who are either injured or deprived of their support by the negligence of the railroads every year and who of necessity institute actions under the Federal Employers' Liability Act to compensate them for their losses.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York for the Ninth District, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 442, Charles L. Douglas, plaintiff-appellant, against The New York, New Haven and Hartford Railroad Company, defendant-respondent, and that the said order and judgment of the court of appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

CHARLES L. DOUGLAS,
Petitioner.

THOMAS J. O'NEILL,
Counsel for Petitioner.

Office Address, 189 Main Street, White Plains, N. Y.

CHARLES D. LEWIS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 312

CHARLES L. DOUGLAS, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The learned special term rendered the following unreported opinion:

> "The Court of Appeals in the Murnan case (246 N. Y., 244) has settled the question as to the discretionary power of the Supreme Court at Special Term to grant this motion, and I think that that discretion should be so exercised as to relieve the Courts of this State of the burden of cases that arise in other states and in which none of the parties is a resident of this State. Motion granted" (R., 16-17).

The Appellate Division of the Supreme Court rendered a memorandum opinion, reported in 223 App. Div., 782, as follows:

> "Order granting defendant's motion to set aside service of summons and complaint and dismiss action affirmed, with ten dollars costs and disbursements" (R., 18).

The Court of Appeals rendered the following opinion on May 29, 1928, 248 N. Y., 78 (Mem.), Vol. 1435, Weekly Advance Sheets:

> "Judgment affirmed, with costs, on authority of Murnan *vs.* Wabash Railway Co., 246 N. Y., 244" (R., 1).

II.

Jurisdiction.

1. The judgment and order of the Court of Appeals to be reviewed is dated May 29, 1928 (R., 1 2).

2. Petitioner contended in the lower Court that he was entitled to maintain his action against the defendant as a matter of right, in accordance with Article 4, Section 2 of the United States Constitution, providing:

> "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states."

And the second clause of Article 6 of the United States Constitution, providing:

> "This Constitution and the laws of the United States, which shall be made in pursu-

> ance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in each state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

And the second clause of Section 6 of the Federal Employers' Liability Act, as amended by the Laws of 1910, Chapter 143, Section 1, 36 U. S. Stat., 291:

> "Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencement of such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States * * *."

And Subdivision 4 of Section 47 of the General Corporation Law of the State of New York:

> "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only * * * (4) Where a foreign corporation is doing business within this state."

3. The jurisdiction of this Court is sought to be invoked under Section 237 of the Judicial Code, as amended, Subdivision B:

"It shall be competent for the Supreme Court, by *certiorari*, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any case wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn any question, the validity of a treaty or statute of the United States; * * * or where any title, right, privilege or immunity especially set up or claimed by either party under the Constitution, * * *; and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied * * *."

4. The cases upon which the petitioner bases his application are as follows: Mondou *vs.* N. Y., N. H. & H. R. R. Co., 223 U. S., 1, reversing 82 Conn., 373, where the Court said, at pages 57-59:

"The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be represented accordingly in the courts of the State. * * * We are not disposed to believe that the exercise of jurisdiction by the State courts will be at-

> tended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. • • • We conclude that rights arising under the Act in question may be enforced, as of right, in the courts of the State when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

Missouri *et al. vs.* Taylor, 266 U. S., 200, at page 208, where the Court, by Brandeis, J., said:

> "The Federal right is enforceable in a State Court whenever its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws."
>
> "Missouri conferred jurisdiction over claims of this nature upon the Court in which the consignee sued. • • • No peculiarity of state procedure will be permitted to enlarge or to abridge a substantive Federal right."

Missouri & Pacific R. R. Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533, where the Court, by Mr. Chief Justice Taft, said:

> "Under Section 2 of Article 4 of the Federal Constitution, the citizens of each state are entitled to all the privileges and immunities of the citizens of the several states. This secures citizens of one state the right to resort to the courts of another state equally with the citizens of the latter state."

Gile *vs.* Cunningham, 133 U. S., 107, where the Court said, at pages 113-114:

> "The intention of Section 2 of Article 4 was to confer on the citizens of the several states a general citizenship and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances, and this includes the right to institute actions. The fact of the citizenship of Butler and Hayden did not affect their privilege to sue in New York and have the full use and benefit of the courts of that State in the assertion of their legal rights; * * *."

Chambers *vs.* Baltimore & Ohio R. R. Co., 207 U. S., 142; State *ex rel.* Watkins *vs.* North American Land & Timber Co., 106 Louisiana, 621; State *ex rel.* Prall *vs.* District Court, 126 Minn., 501.

III.

Statement of the Case.

The plaintiff, a citizen of the United States, and citizen and resident of the State of Connecticut, while engaged in the defendant's employ at its Waterbury yards, in the State of Connecticut, in an Interstate Commerce movement, sustained serious personal injuries on December 1, 1927, and instituted this action under the Federal Employers' Liability Act, in the Supreme Court, Westchester County, to recover for such injuries. Defendant moved before answer to vacate the service and dismiss the action on the ground that the Court's jurisdiction was wholly discretionary, and under the circumstances, since both the plaintiff

and defendant were non-residents of the State of New York, and that the action happened wholly outside the State of New York, the Court in the exercise of sound discretion should refuse to entertain this action.

This view was sustained at Special Term and unanimously affirmed in the Appellate Division (although that Court had previously held to the contrary in Murnan *vs.* Wabash Ry. Co., 220 App. Div., 218) and Court of Appeals, as set forth in the petition herein.

IV.

Specification of Errors.

1. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that in an action brought under the Federal Employers' Liability Act the Supreme Court of the State of New York has any discretion whatsoever to entertain or decline to entertain jurisdiction of the action.

2. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that Article 4, Section 2, and the second clause of Article 6 of the United States Constitution do not compel the Supreme Court of the State of New York to entertain jurisdiction of this cause of action as a matter of absolute right, in view of the jurisdiction of said Supreme Court as established by the case of Gregonis *v.* Philadelphia Coal & Iron Co., 235 N. Y., 152.

3. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that the sec-

ond clause of Section 6 of the Federal Employers' Liability Act, and Subdivision 4 of Section 47 of the General Corporation Law of the State of New York, do not compel the Supreme Court of the State of New York to take jurisdiction of this cause of action as a matter of absolute right.

V.

Argument.

The Court of Appeals bases its decision in this case upon the authority of Murnan *vs.* Wabash Railway Co., 246 N. Y., 244, reversing 200 App. Div., 218, where two questions were certified to the Court by the Appellate Division, as follows:

1. Are the courts of this State vested with any discretion to decline jurisdiction of an action brought under the Federal Employers' Liability Act by a nonresident of the State of New York against a foreign railroad corporation, doing business in the State of New York at the time of the commencement of the action?

2. Should the motion of the defendant railway company for an order vacating the service of the summons and complaint herein and dismissing the action have been granted as matter of law?

The Appellate Division, as above set forth, by a divided court of three to two, Young, J., writing the opinion, held that under the Federal Employers' Liability Act the Supreme Court of the State of New

York had no discretion in the matter of jurisdiction, and that such an action was maintainable as matter of right. This decision was reversed by the Court of Appeals, as aforesaid, and question No. 1 answered in the affirmative, and No. 2 in the negative.

It is respectfully contended under the decisions of this Court in Mondou *vs.* New York, New Haven and Hartford Railroad Company and Missouri *et al. vs.* Taylor, *supra*, no peculiarity of State procedure will be permitted to enlarge or abridge a substantial Federal right; and that where an action is brought in the State court and its ordinary jurisdiction as prescribed by local statutes is adequate to the occasion, the action may be maintained in such court as a matter of right when brought under a Federal statute.

And in Missouri Pacific Railroad Co. *vs.* Clarendon Boat Oar Co., Gile *vs.* Cunningham, Chambers *vs.* Baltimore and Ohio R. R. Co., *supra*, that the privilege referred to in Section 2 of Article 4 of the United States Constitution is one of the oldest and most essential privileges of citizenship and must be allowed by each State to the citizens of all other States to the precise extent that is allowed to its own citizens, and that it secures to the citizens of one State the right to resort to the courts of another State equally with the citizens of the latter State.

These being the rights that the Federal Constitution secures to the citizens of the State of Connecticut in the courts of the State of New York, it is contended the petitioner has been deprived of a Federal

right of substance in being refused as matter of law to prosecute his cause of action under the Federal Employers' Liability Act in a court situated in a county in a State wherein the defendant was doing business at the time of the accident and at the commencement of the suit.

The Court of Appeals, in Gregonis *vs.* Philadelphia Coal & Iron Co., 235 N. Y., 152, the latest authoritative decision upon the subject of rights of citizens of New York to sue foreign corporations, held that the Supreme Court of New York had no discretion to refuse to hear a case brought by a resident of the State of New York upon a cause of action in tort against a foreign corporation arising in another State.

This decision establishes the only question of law of the State of New York that is binding upon this Court, in view of the Federal cases cited *supra*, and absolutely establishes the fact that the decisions in the Murna case and the case at bar are based upon an erroneous unconstitutional practice of the courts of the State of New York, in refusing to grant to the citizens of a sovereign State of the United States the same right to resort to the courts of the State of New York as they grant to citizens of New York.

Perhaps two of the clearest expressions of this right are found respectively in State *ex rel.* Watkins *vs.* North America Land and Timber Co., 106 Louisiana, 621, where the court said, at page 317:

> "If, therefore, the present action would lie in favor of a citizen of Louisiana, it will lie in

> favor of a non-resident relator; and all the more is it true if the relator is a citizen of Kansas, since the Constitution of the United States in such case secures to him, in Louisiana, all the rights, privileges, and immunities which the State of Louisiana accords to its own citizens."

And in State *ex rel.* Prall *vs.* District Court of Waseca County, 126 Minn., 501, where the Court said, at pages 504-5:

> "The question for decision is made plain and its solution certain if we make and answer this inquiry: Why is the relator denied access to our courts? It is not because of the nature of his cause of action. It is not because it arose in Iowa. It is because he is a citizen of Iowa. Therefore, the refusal is violative of the Constitution. It is not a matter of comity. There is no question of discretion. In the Chambers case three of the judges dissented. The conclusion which we have reached is the necessary result of both the prevailing and dissenting opinions. The subject easily leads itself to an exhaustive discussion and review of authorities. It is not worth the while. The one case cited by the Court of final authority conclusively determines the question. There is no discretion in the District Court to decline to entertain jurisdiction."

It follows, therefore, that the Court of Appeals, the Appellate Division and the Special Term of the Supreme Court of the State of New York erred, and it is respectfully submitted that this case is one calling

for the exercise by this Court of its supervisory powers to such end that a writ of certiorari should be granted, and that this Court should review the decision of the Court of Appeals and finally reverse it.

THOMAS J. O'NEILL,
Counsel for Petitioner.

Office and Post Office address: 189 Main Street, White Plains, N. Y.

CHARLES D. LEWIS,
JOHN AMBROSE GOODWIN,
LEONARD F. FISH,
Of Counsel.

FILED
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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 312.

CHARLES L. DOUGLAS, PETITIONER,

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THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Brief in Support of Writ of Certiorari to the Supreme Court of the State of New York.

THOMAS J. O'NEILL,
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Supreme Court of the United States

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THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Brief in Support of Writ of Certiorari to the Supreme Court of the State of New York.

I.

The Opinions of the Courts Below.

The learned Special Term rendered the following unreported opinion:

> "The Court of Appeals in the *Murnan* case (246 N. Y., 244) has settled the question as to the discretionary power of the Supreme Court at Special Term to grant this motion, and I think that that discretion should be so exercised as to relieve the Courts of this State of the burden of cases that arise in other states and in which none of the parties is a resident of this State. Motion granted" (R., 16-17).

The Appellate Division of the Supreme Court rendered a memorandum opinion, reported in 223 App. Div., 782, as follows:

> "Order granting defendant's motion to set aside service of summons and complaint and dismiss action affirmed, with ten dollars costs and disbursements" (R., 18).

The Court of Appeals rendered the following opinion on May 29, 1928, 248 N. Y., 78 (Mem.), Vol. 1435, Weekly Advance Sheets:

> "Judgment affirmed, with costs, on authority of *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244" (R., 1).

II.

Jurisdiction.

1. The judgment and order of the Court of Appeals to be reviewed is dated May 29, 1928 (R., 1-2).

2. Petitioner contends that he was entitled to maintain this action under the Federal Employers' Liability Act in the New York Supreme Court, Westchester County, against the defendant, as a matter of right in accordance with Article 4, Section 2, of the United States Constitution, providing:

> "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states."

And the second clause of Article 6 of the United States Constitution, providing:

> "This Constitution and the laws of the United States, which shall be made in pursuance thereof,

> and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in each state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

And the second clause of Section 6 of the Federal Employers' Liability Act, as amended by the Laws of 1910, Chapter 143, Section 1, 36 U. S. Stat., 291:

> "Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencement of such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States * * *."

And Subdivision 4 of Section 47 of the General Corporation Law of the State of New York:

> "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only * * * (4) Where a foreign corporation is doing business within this state."

3. The jurisdiction of this Court is sought to be invoked under Section 237 of the Judicial Code, as amended, Subdivision B:

> "It shall be competent for the Supreme Court, by *certiorari*, to require that there be certified

to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any case wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn any question, the validity of a treaty or statute of the United States; * * * or where any title, right, privilege or immunity especially set up or claimed by either party under the Constitution. * * *; and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied * * *."

and

This Court's granting of petitioner's petition for a Writ of Certiorari on the 8th day of October, 1928, (R., 24-25).

4. The cases upon which the petitioner based his application for certiorari are as follows:

Mondou v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, reversing 82 Conn., 373.

Missouri et al. v. *Taylor*, 266 U. S., 200.

Missouri & Pacific R. R. v. *Clarendon Boat Oar Co.*, 257 U. S., 533.

Gile v. *Cunningham*, 133 U. S., 107.

Chambers vv. *Baltimore & Ohio R. R. Co.*, 207 U. S., 142.

State ex rel. Watkins v. *North American Land & Timber Co.*, 106 Louisiana, 621.

State ex rel. Prall v. *District Court*, 126 Minn., 501.

III.

Statement of the Case.

The plaintiff, a citizen of the United States, and citizen and resident of the State of Connecticut (R., 17-18), while engaged in the defendant's employ at its Waterbury yards, in the State of Connecticut, in an Interstate Commerce movement, sustained serious personal injuries on December 1, 1927, and instituted this action under the Federal Employers' Liability Act, in the Supreme Court, Westchester County, to recover for such injuries (R., 8-9). It is admitted that the defendant was engaged in business in the State of New York and operated a railroad in Westchester County in that State. Defendant moved before answer to vacate the service and dismiss the action on the ground that the Court's jurisdiction was wholly discretionary, and under the circumstances, since both the plaintiff and defendant were non-residents of the State of New York, and that the action happened wholly outside the State of New York, the Court in the exercise of sound discretion should refuse to entertain this action (R., 5-8).

This view was sustained at Special Term and unanimously affirmed in the Appellate Division (although that Court had previously held to the contrary in *Murnan* v. *Wabash Ry. Co.*, 220 App. Div., 218) and Court of Appeals, as set forth in the petition for review.

IV.

Specification of Errors.

1. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that in an action brought under the Federal Employers' Liability Act the Supreme Court of the State of New York has any discretion whatsoever to entertain or decline to entertain jurisdiction of the action.

2. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that Article 4, Section 2, and the second clause of Article 6 of the United States Constitution do not compel the Supreme Court of the State of New York to entertain jurisdiction of this cause of action as a matter of absolute right, in view of the jurisdiction of said Supreme Court as established by the case of *Gregonis* v. *Philadelphia Coal & Iron Co.*, 235 N. Y., 152.

3. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that the second clause of Section 6 of the Federal Employers' Liability Act, and Subdivision 4 of Section 47 of the General Corporation Law of the State of New York, do not compel the Supreme Court of the State of New York to take jurisdiction of this cause of action as a matter of absolute right.

V.

ARGUMENT.

The Supreme Court of the State of New York is without power to refuse jurisdiction, and to dismiss a complaint, in an action upon the Federal Employers' Liability Act, against a railroad common carrier doing business in the State of New York.

The policy of the State of New York discriminating against non-resident plaintiffs in like actions, is as we respectfully contend, void, unsound and unconstitutional and cannot defeat an action brought under the Federal Act by a citizen of another state against a Railroad Common Carrier doing business in New York State.

Congress made provision that such action may be brought in the district, in which the accident occurred, or in which the defendant resides, or *the district in which the defendant is doing business* (U. S. Compiled Statutes, Sec. 8662; Chap. 149, Sec. 6, April 22, 1908, 35 Statutes 66, Amended, April 5, 1910, Chap. 143, Sec. 1, 36 Statutes 291), whichever is selected by the injured workman or his widow, or orphans.

Congress well knew that any pretense of hardship upon a great railroad corporation in defending in the district in which they are doing business, no matter how far away from the *residence* of the corporation, is disingenuous.

Therefore, as above stated, Congress, made provision that the plaintiff can maintain his action in the district he chose.

Not only that, Congress gave further protection to employees and their widows and orphans, and provided that the State Courts shall have jurisdiction, and blocked any attempt to remove the case to the Federal Court, which also, in some parts of the country, might be remote from the plaintiff's home (U. S. Compiled Statutes, Sec. 8662; Chap. 149, Sec. 6, April 22, 1908, Amended April 5, 1910, Chap. 143, Sec. 1, 36 Statutes 291)

The question therefore is, whether when Congress has explicitly conferred a *right* upon a non-resident interstate railroad employee, under Federal protection, to bring an action in the Supreme Court of the State of New York, can any court of that State arbitrarily nullify the Act of Congress in any case which may be brought before it under the guise of the "anomalous" practice of the Courts of that State? (*Murman* case, 246 N. Y. 244.)

The plaintiff is entitled to maintain this action, as one under the Federal Employers' Liability Act, in

accordance with the provisions of Section 6 of that Act, as amended by the Act of Congress of 1910, supr.

This amendment provides that such an action may be brought in any Circuit Court of the United States in the District of the residence of the defendant, or in which the causes of action arose, or in which the defendant shall be doing business at the time of the commencement of the action.

The amendment further provides that under the same circumstances the state courts shall have concurrent jurisdiction with the United States Courts, and further provides, that no cause arising under this act, which is brought in any state court, shall be removed to any court of the United States. *Thus emphasizing the intention of Congress* to provide that an injured employee of a common carrier might sue under this act, either in the Circuit Court of the United States, or in any state court in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencement of the action. Congress had the right to confer this jurisdiction upon the state courts, *and its provisions are supreme* (*Matter of Taylor*, 232 U. S. 363) *Toledo, St. Louis & Western R. R.* v. *Allen*, No. 160 U. S. Daily yearly index, page 3611, February 24, 1928, and no state court can avoid or refuse to accept the jurisdiction thus conferred. Said act reads as follows:

> "An act to amend an Act entitled, 'An Act relating to the liability of common carriers by railroad to their employees in certain cases, approved April twenty-second, nineteen hundred and eight.
>
> "Be it enacted by the Senate and House of Representatives of the United States of America

in Congress assembled that an Act entitled, 'An Act relating to the liability of common carriers by railroad to their employes in certain cases,' approved April twenty-second, nineteen hundred and eight, be amended in Section Six so that said section shall read:

"Sec. 6. No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Under this act an action may be brought in a Circuit Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under the act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any State Court of competent jurisdiction shall be removed to any act of the United States" * * *.

(April 5, 1919, Chap. 143, Sec. 1, 36 Statutes 291.)

There are few cases that define the real intent of this act.

In *Mondou* v. *New York, New Haven & Hartford Railroad Co.*, 223 U. S. 1, reversing 82 Connecticut 373 and affirming 173 Fed. Rep. 494, this Court construed the Act as follows (pp. 57-59):

"The suggestion that the Act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it pre-supposes what in legal contempla-

> tion does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be represented accordingly in the courts of the State. * * * We are not disposed to believe that the exercise of jurisdiction by the State courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. *The existence of the jurisdiction creates an implication of duty to exercise it*, and that its exercise may be onerous does not militate against that implication. * * * We conclude that rights arising under the Act in question may be enforced, as of right, in the courts of the State when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

No case has arisen in the New York State Courts and gone to the United States Supreme Court where any part of the Federal Act has been construed except *Taylor* v. *Taylor*, 144 App. Div. 634, aff'd. 204 N. Y. 135, reversed in 232 U. S. 363, with the warning to all State Courts in unmistakable terms:

> "We have had many occasions to declare the comprehensive and exclusive power which Congress possesses over interstate commerce."

and, therefore, we find no authority in the cases cited by the Court of Appeals in the *Murnan* case, *supra*, since all of such cases are constructions of Section 47

of the General Corporation Law or similar State Statutes under the due process clause of the Federal Constitution which has no application to the issues here involved.

In *Missouri et al* v. *Taylor*, 266 U. S., 200, at page 208, the Court by Brandeis, *J.*, said:

> "The Federal right is enforceable in a State Court whenever its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws."

Citing again the *Mondou* case, *supra*:

> "Missouri conferred jurisdiction over claims of this nature upon the Court in which the consignee sued. * * * No peculiarity of state procedure will be permitted *to enlarge* or *to abridge a substantive Federal right*" (italics ours).

No attempt was made by Congress to increase the jurisdiction of State Courts and any such attempt would have been void, but what Congress did do was to seek to compel State Courts to exercise a jurisdiction they already possessed not as an act of judicial courtesy but as matter of law to and only to such extent as jurisdiction existed before the amendment.

We have not been able to find any case, decided since the amendment, in which this Court has permitted any interference with the jurisdiction thus expressly conferred by this amendment passed by Congress.

No sound principle of law has ever been cited by any court to attempt to sustain New York's "anomalous" practice even though such practice is thought to be well established, but, on the contrary much sound reasoning

by various courts shows the fallacy of the theory (*Gregonis* v. *P. & R Coal & Iron Co.*, 235 N. Y. 152; *Zikos* v. *Oregon R. & Navigation Co.*, 179 Fed. 893, at page 901).

In the *Murnan* case, *supra*, at page 248, Pound, *J.*, says:

> "We conclude that a litigant who brings his action under the Federal Employers' Liability Act stands before the court in no different attitude than a litigant who brings his action under the statute of a sister State. He may not be cast out because he is suing under the act of Congress. He may not enforce his rights merely because he is suing under the act."

That is what the Courts of Connecticut seemed to think was the law (*Moudou* v. *New York, New Haven and Hartford Railroad Company* and *Hoxie* v. *New York, New Haven and Hartford Railroad Company*, 73 Atl. Rep. 754) and exactly what Congress enacted the amendment of 1910 to do away with (House Report of February 22, 1910, Senate Report of March 22, 1910, to accompany H. R., 17263).

An excerpt from said reports is attached as Appendix A of this brief.

Article 4, Section 2, of the Federal Constitution reads as follows:

> "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

This article is not within the due process provisions of the Federal Constitution but one of the original articles ratified by the States and within that part of the

Federal Constitution which the Judges of all State Courts by their oath of office pledge their support as part of the "*Supreme Law of the Land.*"

The Court of Appeals of New York in *Gregonis* v. *Philadelphia & Reading Coal & Iron Company*, 235 N. Y. 152, in deciding a resident's rights, held, by Crane, *J.*:

> "A thorough search of the authorities from the enactment of revised statutes down to the present day has failed to disclose a single incident wherein the Courts of this State have refused to entertain jurisdiction over a foreign corporation in behalf of a resident for a cause of action arising out of the state. * ** * If we should hold that the Supreme Court had discretion to refuse to hear a case brought by a resident upon a cause of action in tort against a foreign corporation arising in another state, why should it not have like discretion regarding an action upon contract made and executed in another state? * * * A selection between resident plaintiffs—opening the courts to one and closing them to the other—would probably run counter to the constitutional provision of Section 1 of the 14th amendment of the Constitution of the United States. * * * When the Supreme Court says to one resident plaintiff, 'We will not hear your case against a Pennsylvania corporation for a tort committed within that State,' and has power to say to another resident, 'We will hear your case on like facts,' it comes very near to a violation of these constitutional provisions. * * * We are, therefore, of the opinion that, assuming as we must, this plaintiff to be a *bona*

> *fide* resident of the State of New York, the Supreme Court could not refuse to hear his case and had no right to dismiss it."

This case establishes the fact that the Supreme Court of New York must entertain an action brought by a resident against a foreign corporation doing business in this State upon a cause of action *in tort* accruing without the State of New York.

This case, we presume, will be followed by this Court, in deciding the rights of resident plaintiffs to resort to the courts of New York. We have therefore only to deal with the view that this Court takes in relation to the "*privileges and immunities of the citizens of the several states*" when they bring like suit in a court in a state where a resident of that state could maintain the same suit *as matter of right.*

This Court held in *La Tourette* v. *McMaster*, 248 U. S. 465 at page 470:

> "*But our conclusion is not rested upon the mere use of the word 'residents'; for no doubt it might appear from the purpose and scope of an act that 'residents' was used in the sense of 'citizens.' If so, the Court would so construe it; and in no event would the Court sanction an evasion of the purpose and intent of this wise and wholesome provision of the Constitution based on mere verbiage.*"

What else can such a statement mean than when the words 'residents' and 'citizens' are synonymous in their use they will be so declared.

We contend that the use of the words 'resident' and 'non-resident' in the present New York statute (General Corporation Law, Section 47) and in the sections from which it was derived (General Corporation Law, Section 46; Code of Civil Procedure, Section 1780) are

synonymous in one sense with 'citizen' and have been so judicially sanctioned by the Courts of New York ever since the existence of the State.

In support of this contention we challenge the defendant to cite one case where the Courts of New York have denied the absolute right to sue, to any plaintiff whether he be a 'citizen' of New York, a 'resident' of New York, or a friendly 'alien' residing in New York. If no such distinction has ever been made or attempted then a 'citizen' of the United States who becomes such only either by birth or naturalization, becomes a 'citizen' of New York at birth or naturalization and remains such until he changes his domicile sometime later in life at his will; a 'resident' of New York is either a 'citizen' of the United States and a 'citizen' of New York or a 'subject' of a foreign country and a 'resident' of New York. He must be one of the other to be a *bona fide* 'resident.' Therefore, if under any one these various names or conditions a plaintiff has an absolute right to resort to the Courts of New York the use of the word 'resident' in New York statutes is nothing but "an evasion of the purpose and intent of this wise and wholesome provision of the Constitution based on mere verbiage."

In fact the word 'resident' as used in the New York statutes relating to jurisdiction is not only synonymous with 'citizen' but also includes the 'alien' *bona fide* resident of the state.

Crane, *J.*, *in Gregonis* v. *P. & R. Coal & Iron Co.*, 235 N. Y. 152, says at page 156:

> "The notes of the revisers had this to say: 'the fair protection of our own CITIZENS requires that some provision shall be made to render such corporations amenable to our laws and in our own courts'."

At page 159:

> "The courts of this state were primarily for the RESIDENTS of his state. There must be some forceful and controlling reason entering into the very nature and essence of the action which would close their doors to its own CITIZENS."

The Constitution of New York, Section 11 of Article 1, provides:

> "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any CITIZEN thereof, unless by the law of the land, or the judgment of his peers."

And the learned judge writing the *Gregonis'* opinion, *supra*, at page 159, cites this very section of the State Constitution to sustain his opinion that "a selection between resident plaintiffs—opening the courts to one and closing them to the other—would probably run counter to the constitutional provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States, * * *."

This one case should be conclusive proof of how careful the Courts of New York are to point out that there is in reality no valid distinction between a citizen's, resident's or alien's right to use New York Courts under the all inclusive word 'resident.'

If this be so, then to grant as matter of right the use of New York Courts to the citizen, resident and alien alike in tort actions and deny a like absolute right to a native born American citizen, a citizen and resident of the State of Connecticut is the clearest kind of unconstitutional discrimination.

No other state has ever attempted such a brazen violation of the fundamental right of a citizen of a free government (the right to resort to his Courts),

and yet give to the alien resident equal right with the citizen resident to the detriment of the citizen non-resident.

Palmer v. *DeWitt*, 47 N. Y. 532.
Janas v. *Municipal Gas Co.*, 88 A. D. 251.
Alfson v. *Bush Co.*, 182 N. Y. 393.
Kleps v. *Bristol Mfg. Co.*, 107 A. D. 488; affd. 189 N. Y. 516.
George v. *Pierce*, 85 Misc. 105.
Hatch v. *Luckman*, 155 A. D. 765.
Sliosberg v. *New York Life Ins. Co.*, 244 N. Y. 482.

In *Missouri Pacific R. R. Co.* v. *Clarendon Boat Oar Co.*, 257 U. S. 533, 66 Law. Ed., 354, this Court held following the interpretation of the Supreme Court of Louisiana, that where a resident of Louisiana could not have a process in the courts of Louisiana a non-resident could not, and Mr. Chief Justice Taft, delivering the opinion, said:

> "Under Section 2 of Article 4 of the Federal Constitution, the citizens of each state are entitled to all privileges and immunities of citizens in the several states. This secures citizens of one state the right to resort to the Courts of another state, equally with the citizens of the latter state."

The *Louisiana* case, upon which this Court based its decision was *State ex rel Watkins* v. *North American Land & Timber Co.*, 106 Louisiana, 621, 87 Amer. State Reports 309, at page 317, where that Court said:

> "The plea to jurisdiction is based on the proposition that the constitutional and statutory law which has been quoted was intended to con-

> fer upon state courts jurisdiction only in suits brought by citizens of Louisiana against foreign corporations engaged in business here, upon contracts entered into or causes of action arising in this state, and that service of process on the agents of such corporation, designatee in compliance with that law, should not be held to confer jurisdiction in other suits, without regard to the citizenship of the plaintiffs or the subject matter or place of origin of the controversy. Proceeding to the consideration of this proposition we find nothing in the law in question to *discriminate in favor of the citizens of Louisiana* in the matter of bringing suits against foreign corporations, the discrimination made by the second section of the statute relates only to the place of origin of the right or cause of action, *and operating favorably to citizens of other states and countries as to citizens of this state*. If, therefore, the present action would lie in favor of a citizen of Louisiana, it will lie in favor of a nonresident relator; and all the more is it true if the relator is a citizen of the State of Kansas, since the constitution of the United States in such cases secures to him, *in Louisiana* all the rights, privileges, and immunities which the State of Louisiana accords to its own citizens."

In *Gile* v. *Cunningham*, 133 U. S. 107, this Court in construing the Federal Constitution holds that it in effect enables the citizens of one state to maintain actions in the courts of another. The Court says, at pages 113-114:

> "The intention of Section 2 of Article 4 was to confer on the citizens of the several states a

> general citizenship and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances, and this includes the right to institute actions. The fact of the citizenship of Butler and Hayden did not affect their privilege to sue in New York and have the full use and benefit of the courts of that State in the assertion of their legal rights; * * *."

In *Ward* v. *Maryland*, 12 Wallace 430, the United States Supreme Court held that non-residents were entitled to maintain actions in the courts of states other than their residence.

The same contention and interpretation of the Federal Constitution has also been maintained in *Morgan* v. *Neville*, 74 Pa. State 57, where the Court held that a citizen of Pennsylvania could sue in Maryland.

In *Barrall* v. *Benjamin*, 15 Mass., 354, the Courts of Massachusetts held that a citizen of Connecticut was entitled to all the privileges of the citizens of Massachusetts in the Massachusetts Courts.

In *State ex rel Prall* v. *The District Court of Waseca County*, 126 Minn. 5011. Action brought under the Federal Employers' Liability Act in Minnesota. The action arose in Iowa and the plaintiff was a citizen and resident of Iowa. Defendant was incorporated under the Laws of Illinois, and doing business in Minnesota. Mandamus was granted to compel the District Court to entertain jurisdiction of the action as a matter of right when it had refused to in the exercise of its discretion. The Court says at pp. 504-5:

> "Section 2 of Article 4 of the Federal Constitution is as follows: 'The citizens in each State shall be entitled to all the privileges and im-

munities of the citizens in the several states.' By the decisions the word 'privileges' refers to such as are in their nature fundamental and belong of right to the citizens of free government; and among them is the privilege of a citizen of one state to resort to the courts of another state as citizens of such state may do. Thus, in *Chambers* v. *Baltimore & Ohio Railroad Company*, 207 U. S. 142, the Court, in referring to the Constitutional right of the citizens of one state to sue in the Courts of another said: 'It is one of the oldest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it has allowed to its own citizens. The equality of treatment in this respect is not left to depend upon comity between states, but is granted and directed by the Federal Constitution. * * * But, subject to the restrictions of the Federal Constitution the state may determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them. The state policy decided whether and to what extent the state will entertain in its courts transitory actions where the causes of action have arisen in other jurisdictions. Different states have different policies, and the same state may have different policies at different times, but any policy the state may choose to adopt must operate in its own way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is

void, because in conflict with the Supreme Law of the land.

'If it were the policy of this State, evidenced by the decisions of its courts, or fixed by statute, to close its court, both as to citizen plaintiffs and non-citizen plaintiffs, against transitory causes of actions for torts committed in other states, a refusal to entertain jurisdiction would not violate the constitution. Such is not the policy of this state. If a citizen of our state has a cause of action for tort committed against him in Iowa by the Northwestern Railroad Company, the doors of our courts are not closed against him. *The question for decision is made plain and its solution certain if we make and answer this inquiry: Why is the relator denied access to our Court's? It is not because of the nature of his cause of action. It is not because it arose in Iowa. It is because he is a citizen of Iowa. Therefore, the refusal is violative of the Constitution. It is not a matter of comity. There is no question of discretion.*'

In the *Chambers* case three of the judges dissented. The conclusion which we have reached is the necessary result of both the prevailing and dissenting opinions. The subject easily lends itself to an exhaustive discussion and review of authorities. It is not worth the while. The one case cited, from the Court of final authority, conclusively determines the question. There was no discretion in the District Court to decline the exercise of jurisdiction.

Let a peremptory writ issue."

How the "anomalous" practice of New York Courts, *no matter how long established*, can be maintained in

face of Section 2 of Article 4 of the Federal Constitution, in view of this Court's decision to the contrary, is beyond all understanding.

The decisions in *Chambers* v. *B. & O. R. R. Co.*, 207 U. S. 142, and *Loftus* v. *P. R. R. Co.*, 107 Ohio S. 352, do not in the slightest degree support the contention of the defendant, but rather that of the petitioner.

In the *Chambers* case the plaintiff, prior to the Federal Employers' Liability Act, instituted a cause of action in the Courts of Ohio, not existing at Common Law but granted by the Statutes of the State of Pennsylvania, to recover damages for the death of her husband caused by negligence. Plaintiff and her husband at the time of the injuries and death were citizens of Pennsylvania and the wife continued to be such, and the injuries and death occurred in Pennsylvania. Mr. Justice Moody, in the United States Supreme Court, calls attention to the fact that the Statute of Ohio provides that "Whenever the death of a citizen of this state has been or may be caused by wrongful act, etc., in another state * * * for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state—such right of action may be enforced in this state within the time prescribed, etc., by statute of such other state—." * * * "There was no other statutory provision on this subject." The Supreme Court of Ohio held that the action authorized by this statute for a death occurring in another state was only when the death was that of a citizen of Ohio; that the common law of the state forbade such action and that as the person for whose death damages were sought was not a citizen of Ohio the action would not lie.

This *Chambers* decision is based upon the undisputed fact that the plaintiff had no cause of action at com-

mon law in any state, and such *an action could only be brought in Ohio for the death of a citizen of Ohio.*

We may ask what possible application can this decision have to the case at bar where concededly our State Supreme Court has general jurisdiction of actions to recover damages resulting from death caused by negligence or wrongful act and must entertain actions so brought by residents and citizens of New York, and the Federal Employers' Liability Act in and of itself creates such a cause of action, and confers such jurisdiction, except in what Mr. Justice Moody, writing the controlling opinion, says at page 148:

> "In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and directed by the Federal Constitution. * * *."

Mr. Justice Harlan in his dissenting opinion in which two Justices concurred, says at page 154:

> "It is not necessary to fully enumerate the privileges and immunities secured against hostile discrimination by the constitutional provision in question. All agree that among such privileges and immunities are those which, under our institutions, are fundamental in their nature. I

> cordially assent to what is said upon this point in the opinion just delivered for the majority of the court * * * Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other States is void, because in conflict with the supreme law of the land."

Furthermore, the New York State Statute makes no such limitation limiting plaintiffs in New York State Courts to an action to recover damages for the death of a citizen of New York (Decedent's Estate Law, Sec. 130.)

In the case at bar, however, the plaintiff is not suing to recover damages resulting from death caused by negligence, but is merely suing for personal injuries caused by negligence, a cause of action of which New York State courts concededly have jurisdiction at common law, and by statute. (*Robinson* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 351); *McCormack* v. *P. R. R.*, 49 N. Y. 303; *DeHart* v. *Hatch*, 3 Hun. 375; Colonial Statutes creating the New York Supreme Court, May 6, 1691, 1 Col. Laws, pp. 226, 229, etc.).

In the *Loftus* case, *supra*, the plaintiff, a minor employee of defendant, (a Pennsylvania railroad corporation) and a resident of Pennsylvania, was injured in that State and brought suit in the Court of Common Pleas in Ohio under the Federal Employers' Liability Act. The Ohio Venue Statute, Section 11273 (109 O. L. 81) provides in substance that any action against a railroad company must be brought in the County in which the cause of action arose, or in the County in which the claimant resided at the time the cause of action arose, or certain adjoining or nearby counties.

The Supreme Court of Ohio held that this action applied not only to non-residents, but also residents of

the State of Ohio, and that the State Legislature, by the passage of such an act, had limited the general jurisdiction of the Ohio Courts in actions against railroad companies, and had made such restriction as strong against its own citizens as against non-citizens, and that therefore this Venue Act did not violate Section 2 of Article 4 of the Federal Constitution, which, so far as relevant, provides "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The Court held that this Venue Act did not prevent a citizen of any other state from bringing an action under circumstances permitting an Ohio resident to bring a similar suit, and that is the distinction between the *Loftus* case and the case at bar.

We do not claim that the venue provisions of the Civil Practice Act do not apply to a non-resident's action of this kind. For example, if the plaintiff does not sue in the proper county, the Supreme Court of New York may direct the removal of the case to the proper county, but the Supreme Court generally, has no right to decline jurisdiction of this cause of action which it has, because it is also conferred by the Acts of Congress and treat the action so conferred like an action conferred by the Legislature of a sister state.

Properly considered, the *Loftus* case merely holds that the Federal Act does not confer upon a non-resident plaintiff injured outside of said state a greater right than a citizen of Ohio injured in Ohio. Any construction of the decision or opinion in the *Loftus* case to the effect that the Courts of Ohio could decline jurisdiction of an action brought by an injured claimant under the Federal Employers' Liability Act if the Legislature of Ohio had not limited the general jurisdiction of its own courts in actions against railroad companies as to residents and non-residents

alike, would be absolutely in conflict with the decision of this Court in the *Mondou* case, 223 U. S. 1; 57-59; and would have to be disregarded.

The case of *Walton* v. *Pryor*, 266 Ill. 263, has no application to the case at bar. There the plaintiff sued, under the Federal Employers' Liability Act, to recover damages for death caused by negligence. It appears that the Illinois Statute provides: "No action shall be brought or prosecuted in this state to recover damages for death occurring outside of this state" (Laws 1903, page 217).

Of course, no such statute exists in the State of New York. (Decedent's Estate Law, Sec. 130).

In the *Walton* case the Court held that inasmuch as the state statute prevented a citizen of Illinois from bringing an action to recover damages in Illinois for a death occurring outside of that state, it did not accord to its citizens any greater rights than the citizens of other states, and thereby did not violate any of the provisions of the Federal Constitution above cited.

In *St. Louis* v. *Taylor*, 210 U. S. 281, the action was brought before the Federal Employers' Liability Act. It was based, however, on the Federal Safety Appliance Act, which did not confer concurrent jurisdiction upon the State Courts, as does the specific provisions of the Federal Employers' Liability Act. There the Courts of Arkansas held that they had jurisdiction, and this Court held that it could not review this question. This was an action brought in the State Court of Arkansas to recover damages for death occurring in Indian Territory, resulting from negligence. It appears that in Indian Territory, contrary to the doctrine of common law, a right of action for death exists by statute.

It is difficult to see how this opinion is in anyway relevant to the case at bar.

Of course, it must always be remembered that the Statutes of New York have not forbidden non-resident plaintiffs from suing in the courts of our State, foreign corporations doing business in New York for a cause of action arising outside of the State of New York. Upon the contrary, so far as the Statute is concerned, it is expressly authorized. (Sec. 47, Gen'l. Corp'n. Law, Subdiv. 4.)

It is true, of course, that New York courts have held that this merely permits but does not compel the Court to exercise the jurisdiction.

But these decisions are contrary to the greater weight of authority and do not at all effect the question when a person suing has raised the rights guaranteed to him under the Federal Constitution.

Steed v. *Harvey*, 18 Utah 367;
Strander v. *West Virginia*, 100 U. S. 303;
Denick v. *Railroad Co.*, 103 U. S. 11;
Ward v. *Maryland*, 12 Wallace 430;
Cofrode v. *Circuit Judge*, 79 Mich. 342;
Corfield v. *Coryell*, 4 W. C. C. 380-381;
State ex rel. Prall v. *District Court of Waseca County*, 126 Minn. 501.

The petitioner raises the Federal question that the policy of New York and Section 47 of the General Corporation Law violates if they are held to give New York Courts any discretion in actions of the nature of the one at bar, Section 2 of Article 4 of the Federal Constitution, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

Insofar as litigation is concerned this provision of the Federal Constitution, when reduced to its last analysis, plainly means that no state can grant privileges

to its own citizens in its courts greater than those accorded the citzens of other states of the Union, and can impose no greater limitations upon citizens of other states than upon its own citizens; and this Section 47 of the General Corporation Law if it imposes greater limitations does deprive citizens of other states of privileges and immunities granted to the citizens of the State of New York in the courts of that state, and therefore violates this provision of the Federal Constitution.

In *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, it was held that the privileges and immunities clause of the United States Constitution, Article 4, Section 2, protects rights which are in their nature fundamental, including the rights of a citizen of one state to institute and maintain actions in the courts of another, and that non-resident litigants must be given access to the Courts of the State, upon terms which in themselves are reasonable and adequate, although they may not be exactly the same as are accorded to resident citizens.

It is again to be borne in mind that the Statute of the State of New York, Subdivision 4 of Section 47 of the General Corporation Law does not by its terms deprive this plaintiff of the right to bring this action against the defendant in the New York State Courts in the precise manner in which he has brought it, but, on the contrary, specifically seems to authorize the institution by this plaintiff of this very action. The difficulty however, is, that our courts have read into it that it merely means that the New York Courts, may in their discretion refuse to entertain such jursidiction and thus deny the plaintiff any access to our courts in such an action as this.

It is these rulings and this construction of our New York Statute which violates the constitutional provision

referred to, because the defendant contends not merely that the plaintiff may be obliged to sue in a particular county or part of the State of New York, but that he cannot sue in our Supreme Court at all, and that his complaint must be dismissed.

It is with this contention that the plaintiff is in violent conflict.

In this *Canadian R. Co.* v. *Eggen* case *supra*, the United States Supreme Court states

> "the principle on which this holding rests is that the constitutional requirement is satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the Courts, ultimately in this court, to determine the adequacy and reasonableness of such terms."

This, of course, holds that if the non-resident is denied access to our courts under these circumstances that such denial, whether by a statute or judicial decision, is in violation of the plaintiff's constitutional rights.

A similar subject was considered and discussed at length in a very recent opinion by Cardozo, *C. J.*, in *Smith* v. *Loughman*, 245 N. Y. 486, where it was held that the statute imposing a different tax rate on the inheritance transfers of non-residents than that on residents was unconstitutional and in violation of this provision of the United States Constitution.

Likewise the subject is also referred to in *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, where it was held that an income tax law which allowed exemptions

to residents, with increases for married persons and dependents and allowed no equivalent exemptions to non-residents, operates to abridge the privileges and immunities of the citizens of other states in violation of this provision of the Federal Constitution.

However, as heretofore stated, the *Mondou* case, *supra*, clearly holds that the contention that the Courts of this State are free to decline jurisdiction in a case of this kind is "quite inadmissible," and that when Congress established a policy it established a "policy for all the States," and that the imposition of such jurisdiction would probably not be attended by any appreciable inconvenience, but even if so "it affords no reason for declining the jurisdiction, conferred by law," and the claimant's rights under the Federal Act may be enforced "as of right in the courts of any of the states where jurisdiction as prescribed by local laws is adequate to the occasion". (Paraphrase by appellant.)

We assume that this Court will not question the proposition that the jurisdiction of the Courts of New York State, as prescribed by our laws, is adequate to the occasion (*Gregonis* v. *Philadelphia and Reading Coal & Iron Company*, 235 N. Y. 152.)

The debates in Congress when the Federal Employers' Liability Act was under consideration clearly shows that Congress deliberately intended to allow the injured employee or his widow and children to bring suit in a State where the defendant would not be powerful and influential, and that is why the Statute specifically provided that he might sue in the district (1) where the accident happened; (2) where the defendant resides; or (3) in the district where the defendant is doing business.

Congressional Record, Vol. 45, Part 4, 61st Congress, 2nd Session, page 4634.

"The corporation being an inhabitant of the State which creates it, it might follow that the plaintiff would have to travel a long distance in order under certain conditions to bring his action. If this bill should be passed the law will be remedied in that respect enabling the plaintiff to bring his action where the cause of action arose *or where the defendant may be doing business.*"

"*The bill enables the plaintiff to find the corporation at any point or place or State where it is actually carrying on business and there lodge his action if he chooses to do so.*"

Vol. 45, Part 3, page 2255.

"It (meaning the bill) makes it much more convenient for the plaintiff to bring his suit by providing that he may sue in his own district or defendant's district or where the injury occurred *or where the defendant may be found.*"

"And it gives the state courts the right to administer the law."

It is the duty of the Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance *Church of Holy Trinity* v. *U. S.*, 143 U. S. 457; *Ozawa* v. *U. S.*, 260 U. S. 178; *Heydenfeldt* v. *Daney Gold & S. Min. Co.*, 93 N. S. 634.

Section 2 of Article 4 of the United States Constitution, granting the citizens of each state all the privileges and immunities of the citizens in the several states, and the second clause of Article 6 of the Federal Constitution, which provides that the Federal Constitution and that the Laws of the United States

made pursuant thereto "shall be the supreme law of the land *and the judges in every state shall be bound thereby* anything in the Constitution or Laws of any state to the contrary notwithstanding" are parts of the original United States Constitution, and are not any part of the amendments with reference to due process of law; and we respectfully submit that it is the duty of the courts of this state and all of the judges thereof to comply with their oath of office and to obey the command of this Constitution.

As stated by Judge Shiras, in *Murray* v. *Chicago and N. W. Ry. Co.*, (62 Fed. Rep. 24):

> "The discussion by Judge Baldwin of the right of a state court to refuse to enforce such a statute as the one in question and his reference to the 'public policy' of a State as a ground for such a refusal to take jurisdiction indicate clearly that he had in mind the decisions as to the exercise of 'comity' by the courts of one State in taking jurisdiction of foreign laws; that is, the laws of another State. There are many decisions upon the right of a party to enforce in one State the statutes of another.
>
> "If this was such a case, there is authority for the position taken in the *Hoxie* case. But the decision in these cases is justified on the ground that statutes of other States (foreign laws) have not extraterritorial force. Such decisions have no bearing when the question before a state court is the enforcement of a Federal law. This is not a mere question of comity; it is a question of authority."

Therefore, we contend that this Court should hold that the Constitution of the United States and the Fed-

eral Statutes constitute the Supreme Law of New York State and the individual policy of that State contrary thereto must yield to this Supreme Law, for this Court has held, in *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 364; "*The contention that to hold a statute unconstitutional would nullify statutes in existence for many years is not of great weight.*" If such grave words apply to statutes of a Legislature or the Congress of the United States, they should have like application to the decisions of even the highest State Courts.

As a closing argument the words of two of the greatest Judges America has ever produced are very appropriate and may well be followed by this Court.

Mr. Chief Justice Marshall: "This Court can be insensible neither to the magnitude nor the delicacy of the question. However irksome the task may be, this is a duty from which we dare not shrink."

Mr. Justice Story: "I entertain great respect for the legislature, whose acts are in question. I entertain no less respect for the enlightened tribunal whose decision we are called upon to review. It is not for judges to listen to the voice of popular appeal. We have nothing to do but, our duty, pronounce the law as we find it, and having done this our justification must be left to the impartial judgment of our country."

CONCLUSION.

The petitioner respectfully prays that this Court by its supervisory power reverse the judgment appealed from and for such other relief as may be just.

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APPENDIX A.

House Report of February 22, 1910, Senate Report of March 23, 1910, to Accompany H. R. 17263.

The Senate report contains, in part, the following:

> "In declaring that the jurisdiction of the United States shall be 'concurrent with the Courts of the several states' Congress is clearly within its rights and powers.
>
> The first precedent for such declaration is found in the action of the First Congress.
>
> This precedent has repeatedly been followed in Federal Legislation. Thus clearly was it established by those who understood the full scope and operation of the Constitution of the United States, that the 'supreme law of the land' did not lose any of its imperative obligation at the door of a state court.
>
> The express declaration of the United States Constitution says of laws enacted by Congress in pursuance of its delegated powers, '*and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.*'
>
> This declaration of the Constitution is not meaningless. That the 'judges in every State shall be bound' by a Federal law imposes a binding duty to enforce it.
>
> ***This provision leaves no discretion to a judge of a state court to deny justice to a suitor because his right is based on a Federal law.***
>
> Does the fact that state courts are 'established by a sovereign power and maintained at its expense' permit denial of enforcement in such

courts of a right founded on a Federal statute? This question is squarely answered in a case which, strangely enough, is cited by the court in the *Hoxie* case. (*Claflin* v. *Houseman*, 93 U. S. 130.)

It is difficult to understand why the Connecticut court cites the case of *Claflin* v. *Houseman* as authority for the remarkable position taken, for a careful consideration of the opinion of Mr. Justice Bradley in that case shows conclusively that the opinion affords no basis for the contention made by the court that the state court is not authorized and required to enforce Federal statutes.

The Federal law is imperative, mandatory, and paramount over every foot of the soil of every State. It is in no sense foreign when its application or enforcement is sought in the courts of a State. No policy of a State can impair its imperative obligation. No official of a State, sworn to support the Constitution of the United States can deny the enforcement of a statute of the United States, made in pursuance of the United States Constitution. Such law by the the Constitution is made 'the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding.'

How can a judge of a state court deny the imperative obligation of a Federal statute on any occasion in his Court? Before he can lawfully assume the duties as such state judge he is bound by oath in obedience to the express requirements of the Constitution (Art. VI, sec. 3) to support the Constitution of the United States, which in express terms makes Federal statutes 'the supreme law of the land,' and the judges in

every State shall be bound thereby, 'anything in the Constitution or laws of any State to the contrary notwithstanding.'

Federal laws are not dependent upon the judicial courtesy of state courts, to be enforceable in the courts of some States and to be refused enforcement in others. They are 'the supreme law of the land', and the judges in every State shall be bound thereby.

In the case of *Claflin* v. *Houseman*, 93 U. S. 130, Mr. Justice Bradley said:

The general question, whether state courts can exercise concurrent jurisdiction with the federal courts in cases arising under the Constitution, laws, and treaties of the United States has been elaborately discussed, both on the bench, and in published treatises; sometimes with a leaning in one direction and sometimes in the other; but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case.

When we consider the structure and true relations of the federal and state governments, there is really no just foundation for excluding the state courts from all such jurisdiction.

The laws of the United States are laws of the several States, and just as much binding on the citizens and courts thereof as state laws are.

The United States is not a foreign sovereignty as regards the several States, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jur-

isdiction in the State; concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus a legal or equitable right acquired under state laws may be prosecuted in the state courts, and also, if the parties reside in different States, in the federal courts.

So rights, whether legal or equitable, acquired under the laws of the United States may be prosecuted in the United States courts or in the state courts competent to decide rights of the like character and class, subject, however, to this qualification, that where a right arises under a law of the United States, Congress, may, if it see fit, give to the federal courts exclusive jurisdiction.

See remarks of Mr. Justice Field in *The Moses Taylor* (4 Wall., 429; 71 U. S., XVIII, 401) and Story, *J.*, in *Martin* v. *Hunter*, (1 Wheat., 334), and Mr. Justice Swayne in *Ex parte McNeil* (13 Wall., 236; 80 U. S., XX, 624).

This jurisdiction is sometimes exclusive by express enactment and sometimes by implication.

If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court.

The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is

just as much bound to recognize these as operative within the States as it is to recognize the state laws. The two together form one system of jurisprudence which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.

The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state and federal governments.

It is often the cause for the consequence of an unjustifiable jealousy of the United States Government which has been the occasion of disastrous evils to the country.

It is true the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney in the case of *Ableman* v. *Booth* (21 How., 506; 62 U. S., XVI 169), and hence state courts have no power to revise the action of the federal courts, nor the federal the state, except where the Federal Constitution or laws are involved. But this is no reason why state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent and not denied. * * *

Chancellor Kent, in his Commentaries (1 Com., 400), says:

In judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon

the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the federal courts; and that, without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject matter.

To quote from Cooley's Principles of Constitutional Law, pages 32-33:

A state law must yield to the supreme law, whether expressed in the Constitution of the United States or in any of its laws or treaties, so far as they come in collision, and whether it be a law in existence when the 'supreme' law' was adopted or enacted afterwards. The same is true of any provision in the constitution of any State which is found to be repugnant to the Constitution of the Union. And not only must 'the judges in every State' be bound by such supreme law, but so must the State itself, and every official in all its departments, and every citizen.

And in the notes, pages 33-35, we read:

The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it. (*Tennessee* v. *Davis*, 100 U. S. 257, per strong, *J.*, see also *In re Debs*, petitioner, 158 U. S., 564:

Logan v. *United States*, 144 U. S. 263; • • • *Dodge* v. *Wolsey*, 18 How., 331; *Jefferson Branch Bank* v. *Skelly*, 1 Black., 436; *Cummings* v. *Missouri*, 4 Wall., 277; *Railroad Co.* v. *McClure*, 10 Wall., 511; *White* v. *Hart*, 13 Wall., 646; *Gunn* v. *Harry*, 15 Wall., 610; *Pacific Railroad Co.* v. *Maguire*, 20 Wall., 36; *St. Louis, &c., Ry. Co.*, v. *Vickers*, 122 U. S. 360). A state cannot control the conduct of an agency of the Federal Government within its limits, if the result would be a conflict with national law or an impairment of the efficiency of the agency. (*Davis* v. *Elmira Savings Bank*, 161 U. S. 275; *McClellan* v. *Chipman*, 164 U. S., 347. Compare *Reagan* v. *Mercantile Trust Co.*, 154 U. S., 413.)

Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislature as if they had been expressly forbidden to act. (Marshall, *C. J.*, in *Sturges* v. *Crowninshield*, 4 Wheat., 122).

In Robb v. *Connolly* (111 U. S., 637), Justice Harlan said:

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof. Wherever those rights are involved in any suit or proceedings before them; for the judges of the state courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'any

thing in the constitution or laws of any State to the contrary notwithstanding.' If they fail therein, and withhold or deny rights or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination.

In re Matthews, (122 Fed. Rep., 248, p. 251):

The second clause of article 6 of the Federal Constitution is in these words:

"This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

A recent writer in the American Law Review has had this to say concerning this clause, to-wit:

"This provision presupposes that the judges in every State will have some knowledge of the Constitution, the laws, and the treaties of the Federal Government by which they are thus to be bound; and this community of interest and obligation obliviously makes the judicial officers of the several States, in a certain high sense, members of the federal judiciary."

In the case of *Robb v. Connolly* (111 U. S., 637; 4 Sup. Ct., 551; 28 L. Ed., 542), Mr. Justice Harlan said:

"A state court of original jurisdiction, having the parties before it, may, consistently with existing federal legislation, determine cases at law or in equity arising under the Constitution and

laws of the United States, or involving rights dependent upon such Constitution or laws."

In the case of *Ex parte Royall, supra*, Mr. Justice Harlan said:

"In *Taylor* v. *Carryl* (20 How., 595; 15 L. Ed., 1028) it was said to be a recognized portion of the duty of this court (and, we will add, of all other courts, national and state) 'to give preference to such principles and methods or procedure as shall seem to conciliate the distinct and independent tribunals of the States and of the Union, so that these may co-operate as harmonious members of a judicial system, co-extensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and federal obligations.' And in *Covell* v. *Heyman* (111 U. S., 182; 4 Sup. Ct., 358; 28 L. Ed., 390) it was declared 'that the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided by avoiding interference with the process of the other, is a principle of comity, with perhaps no higher sanction than the ability of which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity.'

Pomeroy, 'Introduction to the Constitution Laws of the United States,' third edition, 503. Section 743:

Strip the National Government of an authority to apply a sanction commensurate with its power to legislate, and just so far we subtract from that legislation the necessary element of a command. Strip the Government of the ability to make that sanction supreme, and we equally

invalidate the authority of the legislative utterance. This attribute of supremacy would be destroyed by permitting the state courts, for example, to decide upon the effect of national laws, and by making their decisions in the particular State where made of an equal authority with those pronounced upon the same subject by the national judges. This difficulty thus to be apprehended from the action of state tribunals could only be prevented in one of two ways—either by removing from them the power to decide at all upon rights and duties which spring from the national legislation and conferring the function exclusively upon the United States courts, or by permitting the state judiciary to exercise a jurisdiction in such cases, but making that jurisdiction subordinate to the authority of the national courts and rendering the local decisions reviewable by the United States judges, who could in this manner enforce their attribute of supremacy in relation to the matters under consideration.

In theory the former of these plans would have been the more simple and perfect. But it was perhaps best, from some motives of expediency, that the Constitution should not expressly determine between these two methods, but should clothe Congress with the power of making such a choice of the alternatives as should be found to promote the convenience of the people. Congress possesses such an authority; it might make all this jurisdiction exclusive in the national courts, but has done so only in particular cases; it might suffer the state tribunals to exercise a complete concurrent power, subject to an equally complete liability to review, but has done so only to a limited extent. Whether Congress shall

adopt one or the other alternative is a mere question of policy; it may do either. * * *

The Supreme Court of the United States, in *Teal* v. *Fulton* (53 U. S., 292), referring to this subject, said:

'We will add that the legislation of Congress immediately after the Constitution was carried into operation confirms the conclusion of the learned judge. We find in the twenty-fifth section of the judiciary act of 1789, under which this case is before us, that such a concurrent jurisdiction in the courts of the States and the United States was contemplated, for its first provision is for a review of cases adjudicated in the forum, 'where is drawn in question the validity of a treaty or a statute of, or an authority exercised by, the United States, and the decision is against their validity.'

But it is said that the courts of New York had not jurisdiction to try the case. The objection may be better answered by reference to the laws of the United States in respect to the services to be rendered in the transmission of letters and newspapers by mail and by the Constitution of the United States than it can by any general reasoning upon the concurrent civil jurisdiction of the courts of the United States and the courts of the States, or concerning the exclusive jurisdiction given by the Constitution to the former.

The United States undertakes, at fixed rates of postage, to convey letters and newspapers for those to whom they are directed, and the postage may be prepaid by the sender or be paid when they reach their destination by the person to whom they are addressed. When tendered by the latter or by his agent he has the right to the

immediate possession of them, though he has not had before the actual possession. If they be wrongfully withheld for the charge of unlawful postage it is a conversion for which suit may be brought. His right to sue existing, he may sue in any court having civil jurisdiction of such a case, unless for some cause the suit brought is an exception to the general jurisdiction of the court.

Now, the courts of New York having jurisdiction in trover, the case in hand can only be expected from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States by the Constitution of the United States. That such is not the case, we can not express our view better than Mr. Justice Wright has done in his opinion in this case in the court of appeals. After citing the second section of the third article of the Constitution, he adds. 'This is a mere grant of jurisdiction to the federal courts, and limits the extent of their power, but without words of exclusion or any attempt to oust the state courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The apparent object was not to curtail the powers of the state courts, but to define the limits of those granted to the federal judiciary.'

We will add that the legislation of Congress, immediately after the Constitution was carried into operation, confirms the conclusion of the learned judge. We find in the twenty-fifth section of the judiciary act of 1789, under which this case is before us, that such a concurrent jurisdiction in the courts of the States and of the United States was contemplated, for its first

provision is for a review of cases adjudicated in the former, 'Where is drawn in question the validity of a treaty or statute or, or an authority exercised under the United States, and the decision is against their validity.' We are satisfied that there was no error in the decision of the court of appeals in this case, and the same is affirmed by this court.

In the case of *The Moses Taylor* (1866, 4 Wall., U. S., 428) the court said:

* * * The judiciary act of 1789, in its distribution of jurisdiction to the several federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends Congress may rightfully vest exclusive jurisdiction in the federal courts. It declares that in some cases, from their commencement, such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the state courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offenses, are placed, from their commencement, exclusively under the cognizance of the federal courts.

On the other hand, some cases, in which an alien or a citizen of another State is made a party, may be brought either in a federal or a state court, at the option of the plaintiff; and if brought in the state court may be prosecuted until the appearance of the defendant, and then, at his option, may be suffered to remain thereto, or may be transferred to the jurisdiction of the federal courts. Other cases, not included under

these heads, but involving questions under the Constitution, laws, treaties, or authority of the United States, are only drawn within the control of the federal courts upon appeal or writ of error, after final judgment. By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases, which by the judiciary act could only come under the cognizance of the federal courts after final judgment in the state courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant. The constitutionality of these provisions can not be seriously questioned, and is of frequent recognition by both state and federal courts.

In *Ex parte Siebold* (100 U. S.) the court said:

The power of Congress, as we have seen, is paramount, and may be exercised at any time and to any extent which it deems expedient; and so far as it is exercised and to further the regulations effected supersede those of the State which are inconsistent therewith.

As a general rule, it is no doubt expedient and wise that the operations of the state and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself.

We can not yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every

State owes obedience, whether in his individual or official capacity.

There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the state and national sovereignties. Generally, the powers given by the Constitution to the Government of the United States are given over distinct branches of sovereignty from which the state governments, either expressly or by necessary implication, are excluded.

But in this case expressly, and in some others by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated, that of the State, however, being subordinate to that of the United States, whereby all question of precedency is eliminated.

In a comparatively recent case the Supreme Court of the United States, in the case of *Defiance Water Co.* v. *Defiance* (191 U. S., 194), Chief Justice Fuller, in delivering the opinion of the court, used the following language:

Moreover, the state courts are perfectly competent to decide federal questions arising before them, and it is their duty to do so. (*Robb* v. *Connolly*, 111 U. S., 624, 637, 28 L. Ed., 542, 546, 4 Sup. Ct. Rep. 544; *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S., 556, 583, 40 L. Ed., 336, 543, 16 Sup. Ct. Rep., 389.)

And we repeat, the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require. (*Chicago & A. R. Co.* v. *Wiggins Ferry Co.*, 108 U. S., 18, 27 L. ed., 636, 1 Sup. Ct. Rep., 614, 617; *Shreveport* v. *Cole*, 129 U. S., 36, 32 L. Ed., 589, 9 Sup. Ct. Rep., 210; *Neal* v. *Delaware*, 103 U. S. 370, 389, 26 L. Ed. 567, 571; *New Orleans* v.

Benjamin, 153 U. S., 411, 424, 38 L. Ed. 764, 769, 14 Sup. Ct. Rep., 905.)

If error supervenes the remedy is found in paragraph 709 of the Revised Statutes. (U. S. Comp. Stat., 1901, p. 575.)

Mr. Justice Shiras, in commenting upon the concurrent jurisdictional power of the state and federal courts, in the case of *Murray* v. *Chicago and N. W. Ry. Co.* (62 Fed. Rep., 24), said:

A further point is made in support of the demurrer, to the effect that this court succeeds only to the jurisdiction of the state court in which the action was originally brought, and that state courts have no jurisdiction over cases arising out of interstate commerce, the argument being that as the State can not legislate touching interstate commerce, the state courts are without power to determine cases of the like character. This position is not well taken. The limitations upon the legislative power of the nation and of the several States do not necessarily apply to the judicial branches of the national and state governments. The legislature of a State can not abrogate or modify any of the provisions of the Federal Constitution nor of the acts of Congress touching matters within congressional control, but the courts of the State, in the absence of a prohibitory provision in the Federal Constitution or acts of Congress, have full jurisdiction over cases arising under the Constitution and laws of the United States.

The courts of the States are constantly called upon to hear and decide cases arising under the Federal Constitution and laws, just as the courts of the United States are called upon to hear and decide cases arising under the law of the State when the adverse parties are citizens of differ-

ent States. The duty of the court is to explain, apply, and enforce the existing law in the particular cases brought before them. If the law applicable to a given case is of felonious origin, the legislature of the State can not abrogate or change it, but the courts of the State may apply and enforce it; and hence the fact that a given subject, like interstate commerce, is beyond legislative control does not, *ipso facto*, prevent the courts of the State from exercising jurisdiction over cases which grow out of this commerce. Had this action remained in the state court in which it was originally brought, the court would have had jurisdiction to hear and determine the issues between the parties, because Congress had not enacted that jurisdiction over cases of this character is confined exclusively to the courts of the United States, and therefore the jurisdiction of the state court was full and complete.

The discussion by Judge Baldwin of the right of a state court to refuse to enforce such a statute as the one in question and his reference to the 'public policy' of a State as a ground for such a refusal to take jurisdiction indicate clearly that he had in mind the decisions as to the exercise of 'comity' by the courts of one State in taking jurisdiction of foreign laws; that is, the laws of another State. There are many decisions upon the right of a party to enforce in one State the statutes of another.

If this was such a case, there is authority for the position taken in the *Hoxie* case. But the decision in these cases is justified on the ground that statutes of other States (foreign laws) have not extraterritorial force. Such decisions have no bearing when the question before a state court is the enforcement of a Federal law. This is not a mere question of *comity*; it is a question of *authority*."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 312.

CHARLES L. DOUGLAS, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Brief on Re-Argument in Support of Writ of Certiorari to the Supreme Court of the State of New York.

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CHARLES WATSON RUSSELL, Printer

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 312.

CHARLES L. DOUGLAS, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Brief on Re-Argument in Support of Writ of Certiorari to the Supreme Court of the State of New York.

This case was originally argued on January 16, 1929, and thereafter on February 18, 1929, the Court directed re-argument and at the same time granted leave to the Attorney General of the State of New York to file a brief and take part in the oral argument.

I.

The Opinions of the Courts Below.

The learned Special Term rendered the following unreported opinion:

> "The Court of Appeals in the *Murnan* case (246 N. Y., 244) has settled the question as to the discretionary power of the Supreme Court

> at Special Term to grant this motion, and I think that that discretion should be so exercised as to relieve the Courts of the State of the burden of cases that arise in other states and in which none of the parties is a resident of this State. Motion granted" (R., 16-17).

The Appellate Division of the Supreme Court rendered a memorandum opinion, reported in 223 App. Div., 782, as follows:

> "Order granting defendant's motion to set aside service of summons and complaint and dismiss action affirmed, with ten dollars costs and disbursements" (R., 18).

The Court of Appeals rendered the following opinion on May 29, 1928, 248 N. Y., 580:

> "Judgment affirmed, with costs, on authority of *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244" (R., 1).

II.

Jurisdiction.

1. The judgment and order of the Court of Appeals to be reviewed is dated May 29, 1928 (R., 1-2).

2. Petitioner contends that he was entitled to maintain this action in the New York Supreme Court, Westchester County, against the defendant, as a matter of right in accordance with Article 4, Section 2, of the United States Constitution, providing:

> "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states."

And the second clause of Article 6 of the United States Constitution, providing:

> "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in each state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

And the second clause of Section 6 of the Federal Employer's Liability Act, as amended by the Laws of 1910, Chapter 143, Section 1, 36 U. S. Stat., 291:

> "Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencement of such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any Court of the United States. * * * "

And Section 46 of the General Corporation Law of New York reads as follows:

> "SEC. 46. Action against foreign corporation. An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action."

And Section 47 of the General Corporation Law of New York reads as follows:

> "SEC. 47. Action against foreign corporation by another foreign corporation or non-resident.

An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases *only*: (Italics ours.)

1. Where the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof.

2. Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state.

3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.

4. *Where a foreign corporation is doing business within this state.* (Italics ours.)

Within the meaning of this section, a foreign corporation shall not include a corporation located in this state and created by or under the laws of the United States."

And Section 229 of the Civil Practice Act, which reads as follows:

"SEC. 229. Personal service of summons upon foreign corporation. Personal service of summons upon a foreign corporation must be made by delivering a copy thereof, within the state, as follows:

1. To the president, vice-president, treasurer, *assistant treasurer*, secretary or assistant secretary; or, if the corporation lack either of those officers, to the officer performing corresponding functions under another name.

2. *To a person designated for the purpose as provided in section sixteen of the general corporation law.*

3 and 4. * * *." (Italics ours.)

3. The jurisdiction of this Court is sought to be invoked under Subdivision B of Section 237 of the Federal Judicial Code, as amended, and this Court's granting of petitioner's petition for a Writ of Certiorari.

4. The cases upon which the petitioner based his application for certiorari are as follows:

Mondou v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, reversing 82 Conn., 373.

Missouri et al. v. *Taylor*, 266 U. S., 200.

Missouri & Pacific R. R. v. *Clarendon Boat Oar Co.*, 257 U. S., 533.

Cole v. *Cunningham*, 133 U. S., 107.

Chambers v. *Baltimore & Ohio R. R. Co.*, 207 U. S., 142.

State ex rel. Watkins v. *North American Land & Timber Co.*, 106 Louisiana, 621.

State ex rel. Prall v. *District Court*, 126 Minn., 501.

III.

Statement of the Case.

The plaintiff, a citizen of the United States, and citizen and resident of the State of Connecticut (R., 17-18), while engaged in the defendant's employ at its Waterbury yards, in the State of Connecticut, in an interstate commerce movement, sustained serious personal injuries on December 1, 1927, and instituted this action pursuant to the Federal Employer's Liability Act, in the Supreme Court, Westchester County, to recover for such injuries (R., 8-9). The summons and complaint were served upon the defendant by delivering the same to one Frank E. Hall, who was *designated*

to receive service of such papers on behalf of the defendant, pursuant to respondent's filed designation in New York, and at the same time was and still is *Assistant Treasurer* of the respondent railroad company (R., 6, 7, 8, 9, 17, 18). (See New York Civil Practice Act, Sec. 229, Sub. 1 and 2; and *Bagdon* v. *Phila. and Reading Coal and Iron Co.*, 217 N. Y. 432, at 438, 439; and *Pomeroy* v. *Hocking Valley R. R. Co.*, 218 N. Y. 530.) It is admitted that the respondent was engaged in business in the State of New York and operated a railroad in Westchester County in that State. Respondent moved before answer to vacate the service and dismiss the action on the ground that the Court's jurisdiction was wholly discretionary, and under the circumstances, since both the plaintiff and defendant were non-residents of the State of New York, and that the action happened wholly outside the State of New York, the Court in the exercise of sound discretion should refuse to entertain this action (R., 5-8).

This view was sustained at Special Term and unanimously affirmed in the Appellate Division (although that Court had previously held to the contrary in *Murnan* v. *Wabash Ry. Co.*, 220 App. Div., 218) and Court of Appeals, pages 1-2, *infra*.

IV.

Specification of Errors.

1. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that in an action brought under the Federal Employer's Liability Act the Supreme Court of the State of New York has any discretion whatsoever to entertain or decline to entertain jurisdiction of the action.

2. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that Article 4, Section 2, and the second clause of Article 6 of the United States Constitution do not compel the Supreme Court of the State of New York to entertain jurisdiction of this cause of action as a matter of absolute right, in view of the jurisdiction of said Supreme Court as established by the case of *Gregonis* v. *Philadelphia Coal & Iron Co.*, 235 N. Y., 152.

3. The Court of Appeals, the Appellate Division and Special Term erred in finding and holding that the second clause of Section 6 of the Federal Employer's Liability Act, and Subdivision 4 of Section 47 of the General Corporation Law of the State of New York, do not compel the Supreme Court of the State of New York to take jurisdiction of this cause of action as a matter of absolute right.

V.

ARGUMENT.

Article 4, Section 2, of the United States Constitution guarantees to the citizens of each State all the fundamental privileges and immunities of a citizen of a free government to the same degree, no more and no less, which the citizens of the several States are entitled to as matter of right within their respective States, and inasmuch as the statutes and decisions of New York State authorize a New York citizen to maintain as matter of right an action against a foreign corporation doing business in New York for a tort committed outside said State it necessarily follows that the New York State Court's decisions declining to entertain jurisdiction of a similar action brought by a citizen of a sister State against a foreign corporation under similar circumstances violate the aforesaid provision of the United States Constitution.

From experiences of the original argument in the case at bar before this Court, it appears to the petitioner that there is only one main question involved.

What does Article 4, Section 2, of the United States Constitution guarantee to a citizen of the United States, a citizen and resident of the State of Connecticut, when he resorts to the Supreme Court of the State of New York as a judicial tribunal to adjudicate his rights as such rights are limited by the facts disclosed in this record?

We do not intend to suggest that other questions are unimportant. In fact, all are material to the decision

of the main question, but fortunately they have heretofore been actually decided by either this Court or the Courts of the State of New York, and, therefore, we will not argue such questions but simply refer to decisions to support these collateral issues as they appear.

We do not withdraw any contention previously made in our original brief, or urged upon the original oral argument. Realizing, however, the evident necessity of a more minute analysis of the important constitutional question presented squarely for decision, for the first time, we will attempt to answer all possible opposition by the following argument:

In *State ex rel Prall* v. *The District Court of Waseca County*, 126 Minn. 501, the Court said:

> "If it were the policy of this State, evidenced by the decisions of its courts, or fixed by statute, *to close its court, both as to citizen plaintiffs and non-citizen plaintiffs, against transitory causes of actions for torts committed in other states*, a refusal to entertain jurisdiction would not violate the constitution. Such is not the policy of this state. *If a citizen of our state has a cause of action for tort committed against him in Iowa by the Northwestern Railroad Company, the doors of our courts are not closed against him.* The question for decision is made plain and its solution certain if we make and answer this inquiry: Why is the relator denied access to our Courts? It is not because of the nature of his cause of action. It is not because it arose in Iowa. It is because he is a citizen of Iowa. Therefore, the refusal is violative of the Constitution. It is not a matter of comity. There is no question of discretion" (Italics ours).

We can gather no other meaning from this forceful language than that, if the State of New York allows its own citizens to maintain as of right an action in tort against a foreign corporation when the tort occurred

outside the State that it must allow a like right to non-citizens. The Minnesota Court based its decision on *Chambers* v. *Baltimore & Ohio Railroad Co.*, (207 U. S. 142), and this Court's decision in the latter case indicates very plainly, we believe, that our contention is beyond dispute.

This leads us of necessity to consider the law of the State of New York. We contend, it settled beyond dispute, that the Supreme Court of the State of New York must entertain an action in tort brought by a resident of New York (A citizen of New York must be a resident of New York, United States Constitution, Section 1, 14th Amendment; and Article 1, Sections 1 and 8, Article 2, Section 1, N. Y. Constitution, 1894) against either a natural person or a domestic, *or foreign corporation*, regardless of where the tort occurred, provided service of process can be made within the State of New York, and if the corporation is a foreign corporation that that corporation is actually doing business within the State of New York at the time of the commencement of the action.

Decisions of the New York Court of Appeals are not numerous upon this point, by reason of the fact that the Federal Congress as far back as 1789 (1 Stat. 73) and by subsequent legislation, up to and including Section 71 of the present Judicial Code, provided for the removal of such actions as matter of right to the Federal Courts where a diversity of citizenship and the required amount were present.

But fortunately in the early days of our existence, both national and state, removal of actions from state to Federal Courts was less frequent than at present, when it has become almost a universal rule.

We, however, find instances where actions have been instituted and maintained in the following cases:

Dale v. *Delaware, Lackawanna & Western R. R. Co.*, 73 N. Y. 471. Plaintiff was a resident of the City of

Brooklyn, and on April 3, 1871, was a passenger on one of defendant's trains bound from Montrose Station, New Jersey, to New York City, and was injured as the train passed over the Passaic River, New Jersey. The complaint alleged defendant was a Pennsylvania corporation and lessee of the Morris-Essex Railroad Company, a New Jersey corporation, on whose lines the accident occurred. The answer admitted these allegations. (Court of Appeals original record from its library, Albany, N. Y.)

Smith v. *British and North American Royal Mail Steam Packet Company*, 86 N. Y. 408. In August, 1877, plaintiff took passage from Liverpool, England, to New York City, N. Y., on defendant's steamship "Algeria" and arrived in New York City on October 3, 1877. He was injured on the high seas on September 25, 1877, and lived in New York City. The complaint alleges the defendant is a corporation existing under the laws of the United Kingdom of Great Britain and Ireland, and the answer admits this allegation. (Court of Appeals original record from its library, Albany, N. Y.)

Archer v. *N. Y. N. H. & H. R. R. Co.*, 106 N. Y. 589. Plaintiff was a travelling salesman residing in New York City, and on October 20, 1880, arrived at defendant's station at Hartford, Conn., on a train of the New York and New England Railroad Company. While standing on the station platform he was struck by one of defendant's trains. The complaint alleges the defendant was a corporation of the State of Connecticut, and operated its trains between New York City and Hartford. The answer admits this allegation. (Court of Appeals original record from its library, Albany, N. Y.)

Spooner v. *Delaware, Lackawanna & Western R. R. Co.*, 115 N. Y. 22. Plaintiff, an infant, was a resident

of the City of Brooklyn, N. Y., and while visiting her aunt at East Orange, N. J., was struck by one of defendant's trains. The complaint alleges that the defendant was a Pennsylvania corporation and was the lessee of the Morris-Essex Railroad Company, a New Jersey corporation, on whose lines the accident occurred. The answer admits this allegation. (Court of Appeals original record from its library, Albany, N. Y.)

Scott v. *Pennsylvania R. R. Co.*, 130 N. Y. 679. Plaintiff resided at the time of the commencement of the action in New York City, and at the time of the accident at Rahway, N. J. He was struck by one of defendant's trains at Rahway, N. J. The complaint alleges the defendant was a Pennsylvania corporation and the lessee of the New Jersey Railroad and Transportation Company, a New Jersey corporation, on whose lines the accident occurred. The answer admits this allegation. (Court of Appeals original record from its library, Albany, N. Y.)

Huckenbottom v. *Delaware, Lackawanna & Western R. R. Co.*, 122 N. Y. 91. Plaintiff resided in New York City and was injured in Newark, N. J. Complaint alleges that defendant was a Pennsylvania corporation. This allegation is admitted by the answer. (Court of Appeals original record from its library, Albany, N. Y.)

Palmer v. *Pennsylvania R. R. Co.*, 111 N. Y. 488. In the original record at the Court of Appeals, the record on appeal from the judgment does not appear. In its place are papers on appeal from an order denying the motion to set aside the service of the summons and complaint.

The complaint alleges that the defendant was a Pennsylvania corporation and the lessee of the Pittsburgh, Fort Wayne and Chicago Railroad Company,

and that on December 14, 1882, the plaintiff purchased at the office of the defendant in the City of Chicago, Ill., a ticket from that city to Newburgh, N. Y., over the lines of the Pittsburgh, Fort Wayne and Chicago Railroad Company, to Mansfield, Ohio, and thence over other lines to Newburgh, N. Y.

Plaintiff took passage on one of defendant's trains from Chicago to Mansfield, and in attempting to alight at the latter station was thrown from the car platform.

The complaint does not allege the plaintiff's residence, but from the fact that he purchased his ticket to Newburgh, N. Y., and that he was represented by an attorney whose address was Newburgh, N. Y., it seems safe to presume that he was a resident of the State of New York. (Court of Appeals original record from its library, Albany, N. Y.)

In the year 1894, however, the Court of Appeals, for the first time, as far as we can find, wrote an opinion directly passing upon the question. (*Flynn* v. *Central Railroad Company of New Jersey*, 142 N. Y. 439.)

In the *Flynn* case, Flynn was a resident of New York, residing in the City of Brooklyn, and working in the State of New Jersey, where and when he was injured by the defendant, a New Jersey corporation. The lower Court held jurisdiction as matter of right upon the combined reasoning of two previous cases in the Court of Appeals. *Popfinger* v. *Yutte*, 102 N. Y. 38; and *Robinson* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 351.) And the Court of Appeals said:

> "A preliminary point was taken at the trial and argued on this appeal challenging the jurisdiction of the Superior Court of the City of New York either of the defendant or the subject of the action. It is claimed that, as the plaintiff at the date of commencing the action was a resident of the city of Brooklyn, the defendant a

foreign corporation, and the cause of action one that accrued in New Jersey, the court under Section 263, Subdivision 7 of the Code of Civil Procedure had no jurisdiction. This section deals with the jurisdiction of superior city courts. Subdivision 7 extends it 'To an action by a resident of that city against a foreign corporation, either (1) to recover damages for the breach of a contract, express or implied, or the sum payable by the terms of a contract, express or implied, where the contract was made, executed or delivered within the state; or (2) where a warrant of attachment granted in the action has been actually levied within that city upon property of the corporation; or (3) where the summons is served by delivery of a copy thereof, within that city, to an officer of the corporation, as prescribed by law.'

It is sufficient answer to this objection that the jurisdiction of the Superior Court of the City of New York is defined by Article 6, Section 12 of the Constitution of this State, which reads in part as follows: 'The Superior Court of the City of New York' (and three other courts named) 'are continued with the powers and jurisdiction they now severally have, and such further civil and criminal jurisdiction as may be conferred by law.'

This article of the Constitution was ratified by the People in November, 1869, and took effect in 1870. At that time the Superior Court of the City of New York had jurisdiction in an action by a resident of this state for any any cause of action against a corporation created by or under the laws of any other state, government or country. (Code of Procedure, Sec. 427.) Any legislation limiting this jurisdiction is unconstitutional.

The court in *Popfinger* v. *Yuille* (102 N. Y. 38) held Subdivision 5 of Section 263 of the Code of Civil Procedure unconstitutional as being in conflict with the provision of the Constitution

> already cited. We hold the Superior Court of the City of New York had jurisdiction of this action. We now come to the consideration of this appeal on the merits."

The Superior Court of the City of New York was abolished by the Constitution of New York of 1894, (article 6, section 5), and the Judges of said court were made Justices of the Supreme Court, and all of the jurisdiction of said Superior Court was given to the Supreme Court.

Thus the law has remained to the present day, never seriously questioned by anybody,—*Gregonis* v. *Philadelphia & Reading Coal & Iron Co.*, (235 N. Y. 152) where the Court said, through Crane, *J.*:

> "The Appellate Division dismissed the complaint. As there was evidence sufficient to create a question of fact as to residence, the Appellate Division might have reversed upon the weight of evidence and granted a new trial but could not dismiss the complaint (*Woicianowicz* v. *P. & R. Coal & Iron Co.*, 232 N. Y. 256). It went further, however, and assumed that if the plaintiff were a resident of the State of New York the Supreme Court had the discretion and the power to dismiss the complaint because the tort happened in Pennsylvania and was governed somewhat by the Statutes of that State. The question is, therefore, squarely presented to us, whether or not the Supreme Court has any such power over an action brought by a resident of the State of New York. * * * As to a resident, however, a different question arises and a different law is applicable. Can the Supreme Court refuse to hear a case against a foreign corporation brought by one resident of this State, where the tort occurred outside the State, and entertain jurisdiction for another resident upon the same state of facts? If it has discretion to refuse jurisdiction in the one instance, it must have a like

> discretion to entertain it in the other. Discretion implies the power to make a choice. We do not think that as to a resident of this State the Court has any such discretion."

The statement of the law thus expounded by the learned Judge was therefore not dicta, but an authoritative restatement of the law of New York, as it had existed since the creation of the Supreme Court in 1691 (1 Col. Laws, pp. 226-229, 303-306, 358, 380; 2 id. 462, 639, 948; 3 id. 546, 780, 1007; 4 id. 1088, 5 id. 73).

The Act of May 6, 1691, of the Legislature of the Colony of New York, as far as applicable to the present question, read as follows:

> "That there shall be held and kept a Supreame Court of Judicature, which shall be Duely & Constantly kept att the Citty of New Yorke and not Elsewhere, att the severall & Respective times hereafter mentioned. And that there be five Justices at Least appointed & Commissionated to hold the same court, two whereof together with one Chief Justice to be a Quorum. Which Supreame Court are hereby fully Impowered and Authorized to have Cognizance of all pleas, Civill Criminall, and Mixt, as fully and amply to all Intents & purposes whatsoever, as the courts of Kings Bench, Comon Pleas, & Exchequer within their Majestyes Kingdome of England, have or ought to have * * *."

As was later said, "This Act founded the Supreme Court. * * * Not only did this act erect the tribunal which still continues the great law court of the state, but it vested in it a jurisdiction which change of government and constant reforms and revolutions in procedure have been powerless to abridge in any material respect, for while its jurisdiction has been enlarged by its union with the Court of Chancery, its ancient jurisdiction still remains unimpaired. The Supreme Court

of the Province was the instrument by which the great body of jurisprudence of the English common law was applied to New York." (*In re Steinway*, 159 N. Y. 250).

To supplement this inherent jurisdiction protected by the New York State Constitution of 1894 (Article 6, Section 1) as previously protected by Constitutions of 1821, Art. 5, sec. 4; 1846, Art. 6, sec. 3; Judiciary Article of 1869, Art. 6, sec. 6, amended 1879 and 1888, we have Section 46 of the General Corporation Law of New York, reading as follows:

> "Action against foreign corporation. * * * An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action."

Any statute of this State attempting to limit the jurisdiction of the Supreme Court, as to a citizen's or resident's fundamental right to resort to his superior court of original jurisdiction (New York Supreme Court) would violate the present New York State Constitution of 1894. (*Gregonis* v. *Philadelphia Coal & Iron Co., supra; People* v. *Luce*, 204 N. Y. 478; *People* v. *Nichols*, 79 N. Y. 582; *DeHart* v. *Hatch*, 3 Hun. 375).

The refusal, therefore, to take jurisdiction as matter of right of a similar action brought by a citizen of the United States, a citizen and resident of a sister state (Connecticut) in the Supreme Court of the State of New York is discriminatory and such refusal violates the plain intent of Article 4, Section 2, of the Federal Constitution.

Such refusal to entertain jurisdiction as matter of right in the case as bar is nothing short of unconstitutional discrimination under a guise.

At common law a non-resident of New York could maintain an action in tort against a foreign corpora-

tion in the New York Supreme Court regardless of where the cause of action arose if service of process could be obtained in the State of New York. (*McCormack* v. *Pennsylvania RR. Co.*, 49 N. Y. 303; 1 Colonial Statutes of New York, pp. 226, 229).

Between 1876 and 1913 an attempt was made to change the common law by a statute limiting the New York Supreme Court's jurisdiction as matter of right. (*Code of Civil Procedure*, section 1780; *Robinson* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 315; *Hoes* v. *N. Y. N. H. & H. R. R. Co.*, 173 N. Y. 435; *Pietraroia* v. *N. J. & H. R. R. & F. Co.*, 197 N. Y. 434).

Whether such statute was a constitutional limitation on the New York Supreme Court's jurisdiction as matter of right where a foreign corporation was actually doing business in the state is a serious constitutional question in view of Article 1, Section 6, of the New York State Constitution of 1894 and Article 4, section 2 of the United States Constitution, but the question is immaterial in the instant case.

Since, by Chapter 60 of the New York Laws of 1913, section 1780 of the Code of Civil Procedure was amended by adding subdivision 4 to read as follows:

> "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases *only*: (Italics ours) * * *
>
> "4. Where a foreign corporation is doing business within the State."

The use of the word *only* is very important as it is claimed to have changed the rule of *McCormack* v. *Pennsylvania R. R. Co.*, *supra*. Evidently, meaning that the Supreme Court has jurisdiction *only* in the four classes of cases specifically mentioned. (*Robinson* v. *Oceanic Steam Navigation Co.*, *supra*.)

By Chapter 916 of the New York Laws of 1920 section 1780 of the Code of Civil Procedure was re-enacted, unchanged, and became section 47 of the General Corporation Law of New York, where we now find it.

The Statute as it now reads is neither in conflict with natural justice nor the Federal Constitution. The difficulty is, that New York Courts have interpreted it to mean what the judges privately seem to believe the law should be, based on principles of state comity (*Murnan* v. *Wabash R. R. Co.*, 246 N. Y. 244), and not according to the intent of Article 6 of the Federal Constitution in view of Article 4, Section 2 of that instrument and the rights of residents of New York to resort to state courts.

It is this conflict that we ask this Court to overrule, since by the weight of authority the Supreme Court of the United States in the exercise of its appellate jurisdiction is not bound by the decision of a final state court establishing state law when that decision makes that which is constitutional unconstitutional within the plain intent of the Federal Constitution. (*Ward and Gow* v. *Krinsky*, 259 U. S. 503; *Fiske* v. *Kansas*, 274 U. S. 385; *Southwestern Tel., etc., Co.* v. *Danaher*, 238 U. S. 482; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S 292.)

Great stress has been placed by our courts on the words "may be maintained" as used in the section 47. They have been construed to vest a discretion in the court to entertain or decline an action. The same words, however, are used in section 46 of the same statute enacted at the same time, and as to their use in the latter section they have always been held mandatory. (*Gregonis* v. *Philadelphia & Reading Coal & Iron Co.*, *supra*.)

By what legal principle, we ask, do the same words command obligatory jurisdiction as matter of right in the case of a resident and give discretionary jurisdiction in the case of a non-resident in the same kind of an action in tort?

The principle of comity, perhaps, justifies certain classes of discrimination. But this principle has no application to the present action under our constitutional form of government, (*Murray* v. *Chicago & N. W. R. R. Co.*, 62 Fed. Rep. 24) since the present action involves the enforcement of the Federal Constitution and an act of Congress and not the applicability of a statute of a sister state.

This Court has dealt with the use of the word "residents" in *LaTourette* v. *McMaster*, 248 U. S. 465, and at page 470 said:

> "But our conclusion is not rested upon the mere use of the word 'residents'; for no doubt it might appear from the purpose and scope of the act that 'residents' was used in the sense of 'citizens'. If so, the Court would so construe it; and in no event would the Court sanction an evasion of the purpose and intent of this wise and wholesome provision of the Constitution based on mere verbiage."

What else does the New York ruling amount to but a guise "based on mere verbiage" to defeat the purpose of the Second section of Article 4 of the Federal Constitution.

The old cry of "State Rights versus Federal Authority" is apparent when our courts go so far as to hold that because state courts are organized and maintained by the citizens of the state and supported by state funds, they are some kind of a separate judicial system, whereas the very nature of our government, "an indestructible nation composed of indestructible

states'' requires that Federal and state courts compose one harmonious judicial system and not distinct systems like the courts of sister states bear to each other. (*Taylor* v. *Carryl*, 20 How. 595; *Covell* v. *Heyman*, 111 U. S. 182; *Claflin* v. *Houseman*, 93 U. S. 139.)

If New York allows its 'residents' the absolute right to resort to its courts, it must also allow its 'citizens' the same privilege for 'residents' must of necessity, under our constitutional form of government at least include 'citizens'. (Section 1, 14th amendment, U. S. Constitution.) To refuse a like absolute right to non-residents, when the non-resident is a citizen of the United States, of necessity must violate Section 2 of the 4th Article of the United States Constitution. (*Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142; *Missouri Pacific R. R. Co.*, v. *Clarendon Boat Oar Co.*, 247 U. S. 533; *Cole* v. *Cunningham*, 133 U. S. 107; *State ex rel. Watkins* v. *North American Lumber and Timber Co.*, 106 Louisiana 621; and *State ex rel. Prall* v. *District Court*, 126 Minn. 501.)

The discrimination in the case at bar is especially dangerous because it denies a fundamental right to a citizen of a free government to resort to one of his courts, (*Corfrila* v. *Coryell*, 4 W. C. C. 380) except for some special extenuating circumstances. (*Murnan* v. *Wabash R. R. Co.*, 246 N. Y. 244.)

True, the legislatures of the several states may, so to speak, burden a non-resident's right to resort to courts of the particular state; such as applying a short statute of limitations; requiring security for costs; providing for attachment and similar protective measures. To do this is not depriving him of his day in Court. It is simply compelling prompt attention to one's rights and extending protection to the defendant in the jurisdiction in which he is compelled to answer the alleged complaint.

Respondent cited in its original brief numerous cases of alleged discrimination against non-residents. The most important of which are: *Walton* v. *Pryor*, 276 Ill. 563, 245 U. S. 675; *Loftus* v. *Pennsylvania R. Co.*, 107 Ohio St. 352, 266 U. S. 639; *Chambers* v. *Baltimore & O. R. R. Co.*, 207 U. S. 142; *Missouri Pac. R. R. Co.* v. *Clarendon Co.*, 257 U. S. 533.

In our main brief we distinguished between these authorities and the case at bar. In each instance, some fact was present which deprived the Court of one of the essential elements of "ordinary jurisdiction, as prescribed by local laws, appropriate to the occasion, and invoked in conformity with the local laws." Either a citizen or resident as the case may have been could not invoke the court's protection in the given case, or, the court had no jurisdiction of the parties or subject matter under the given circumstances.

But, in the instant case none of these disqualifying elements are present, the Court has complete jurisdiction of the subject matter and the parties litigant, so these cases cited by respondent really turn out to be authorities or dicta in support of petitioner's contention.

The conclusion is inevitable that the Supreme Court of New York has appropriate jurisdiction to try and adjudicate the instant case (*Murnan* v. *Wabash, supra*), therefore, to deny that jurisdiction as matter of right to a citizen of the United States, a citizen and resident of Connecticut, is a true violation of the Federal Constitution.

Of course, we realize that this very important provision of our Federal Constitution has never been directly construed by this Court, but each and every decision, where dicta statements have appeared, leads to no other answer than that we have heretofore contended. (*Cole* v. *Cunningham*, 133 U. S. 107; *Chambers* v. *Bal-*

timore & Ohio R. R. Co., 207 U. S. 142; *Missouri & Pacific R. R. Co.* v. *Clarendon Boat Oar Co.*, 257 U. S. 533; *Ward* v. *Maryland*, 12 Wallace 430.)

There are, however, two direct state court interruptions in *State ex rel. Watkins* v. *North American Land & Timber Co.*, 106 Louisiana 621, and *State ex rel. Prall* v. *District Court of Wasecа County*, 126 Minn. 501. Both decisions hold that a citizen of a sister state is entitled to maintain an action in tort in either Louisiana or Minnesota where the tort occurred outside the State to the same extent, no more and no less, as a citizen of either of the respective states.

Further argument is futile. The New York Courts are in error, and the error must be remedied. The Federal Government must either assert its authority or surrender and acknowledge that the doctrine of comity applies to its relations with the several states.

Having disposed of the main question of the effect of Section 2 of Article 4 of the United States Constitution as applicable to the facts in the case at bar, there remains but a few important though really collateral matters to be disposed of.

(a) The power of the Congress over interstate commerce.

(b) The power of the Legislature of the State of New York to change the general law of the State, and whether or not such changes impose a burden upon interstate commerce or violate the obligation of an alleged contract between the State of New York and the New York, New Haven and Hartford Railroad Company.

(a) In dealing with the first of these issues there seems to be no dispute but that the Federal Congress

has the sole and exclusive power to legislate in regard to interstate commerce. (Article 1, Section 8, United States Constitution; *Minnesota Rate Cases*, 230 U. S. 852; *Dayton-Goose Creek R. R. Co. v. United States*, 263 U. S. 456; *2nd Employer's Liability Cases*, 223 U. S. 1.)

The only exceptions are: (1) If the Congress has made no express regulations with regard to foreign or interstate commerce, its inaction is equivalent to a declaration that it shall be free (*Welton v. Missouri*, 99 U. S. 275; *Brown v. Houston*, 114 U. S. 622) and (2) The power is not so far exclusive as to preclude state legislation on matters either local in their nature or operation, or intended to be mere aids to commerce, for which special regulations can be more effectually provided. (*Cooley v. Board of Wardens*, 12 Howard 299; *Henderson v. New York*, 92 U. S. 259; *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23).

The Congress, well aware of its powers over interstate commerce (see House Report of February 22, 1910, and Senate Report of March 22, 1910, to accompany H. R. 17263, Appendix A of our main brief) made provision that an action, such as the one in the case at bar, might be maintained in the district in which the accident occurred, or in which the defendant resides, or THE DISTRICT IN WHICH THE DEFENDANT IS DOING BUSINESS (U. S. Compiled Stat., Sec. 8662; Chap. 149, Sec. 6, April 22, 1908, 35 Stat. 66, amended April 5, 1910, Chap. 143, Sec. 1, 36 Stat. 291) whichever venue was selected by the injured workman or his widow or orphans.

Congress well knew that any pretense of hardship upon a great railroad corporation in defending such an action in a district in which it was actually doing busi-

ness, no matter how far from the residence of the corporation, is disingenuous.

No matter what else may be said about the amendment of section 6 of the Federal Employer's Liability Act of 1910 it certainly placed a burden upon interestate commerce, which was solely within the power of Congress, and which deprived a defendant railroad company of the benefits of removal to a federal court where a diversity of citizenship and the required amount are involved in the litigation pursuant to section 71 of the Judicial Code.

Not only did Congress make such provisions apply to actions when instituted in the United States District Court, but it expressly made the jurisdiction of the state courts concurrent with that of the federal courts and allowed the burden upon interstate commerce to remain when the action was instituted in the state court.

The debates in Congress when the Federal Employer's Liability Act was under consideration clearly shows that Congress deliberately intended to allow the injured employee or his widow and children to bring suit in a State where the defendant would not be powerful and influential, and that is why the Statute specifically provided that he might sue in the district (1) where the accident happened; (2) where the defendant resides; or (3) in the district where the defendant is doing business.

Congressional Record, Vol. 45, Part 4, 61st Congress, 2nd Session, page 4034.

> "The corporation being an inhabitant of the State which creates it, it might follow that the plaintiff would have to travel a long distance in order under certain conditions to bring his action. If this bill should be passed the law will be remedied in that respect enabling the plain-

tiff to bring his action where the cause of action arose *or where the defendant may be doing business.*"

"*The bill enables the plaintiff to find the corporation at any point or place or State where it is actually carrying on business and there lodge his action if he chooses to do so.*"

Vol. 45, Part 3, page 2255.

"It (meaning the bill) makes it much more convenient for the plaintiff to bring his suit by providing that he may sue in his own district or defendant's district or where the injury occurred *or where the defendant may be found.*"

"And it gives the state courts the right to administer the law."

It is the duty of the Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance. *Church of Holy Trinity* v. *U. S.*, 143 U. S. 457; *Ozawa* v. *U. S.*, 260 U. S. 178.

Congress thus emphasized its intent to provide that an injured employee of a common carrier railroad might sue under this act either in the District Court of the United States, or in any state court of competent jurisdiction in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencement of the action. No doubt, Congress had the right to confer this jurisdiction upon the state courts, and the provisions of the Congressional Act are supreme. (*Matter of Taylor*, 232 U. S. 263; *Toledo, St. Louis and Western R. R. Co.* v. *Allen*, 72 L. Ed. 267; *Mondou* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1; *Missouri et al* v. *Taylor*, 266 U. S. 200). In fact and in law the state courts already had juris-

diction and the only way such jurisdiction could be limited was for Congress to expressly do so.

That Congress, when legislating regulating interstate commerce, may compel the several state courts to take jurisdiction of *civil* actions authorized by such legislation, whenever said "state courts ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws," is too well settled to dispute. (Cases *supra*, U. S. Constitution, Article 1, section 8, and Article 6, *Robb* v. *Conley*, 111 U. S. 637; *Tennessee* v. *Davis*, 100 U. S. 257; *Taylor* v. *Carryl*, 20 How. 595; *Covell* v. *Heyman*, 111 U. S. 182; *Teal* v. *Fulton*, 63 U. S. 292; *Defiance Water Co.* v. *Defiance*, 191 U. S. 194).

The instant case deals only with the powers of Congress relating to civil actions and not federal penal laws, which undoubtedly because of their penal nature can not be made enforceable in state courts by Congress as matter of right, since they are controlled by a fundamentally different rule. (Late Prohibition Cases.)

However, take the civil rule. Congress has sole power to legislate regulating interstate commerce, and pursuant to that power gave an injured railroad employee a cause of action against his master when both were engaged in an interstate commerce movement. The action sounds in tort, the amount of recovery is unlimited, special provisions covering safety appliances were put in the so-called Safety Appliance Act, contributory negligence was made a matter of diminution of damages only, the negligence of fellow-servants was wiped out, questions of assumption of risk were changed and deprived of the severity of common law interpretation. Most of these provisions are in conflict with the well-established principles of New York Law applicable to tort actions, but, nevertheless, our courts have correctly held that the provisions of a federal act

exclusively control when the action is instituted in the New York Supreme Court. (*Ward* v. *Erie R. R. Co.*, 230 N. Y. 230; *Cott* v. *Erie R. R. Co.*, 231 N. Y. 67; *Pless* v. *N. Y. Central R. R. Co.*, 232 N. Y. 522). And our Supreme Court is trying such cases almost every day when brought by a resident as matter of right and when brought by a non-resident as matter of discretion. (*Murnan* v. *Wabash R. R., Co.*, 246 N. Y. 244).

So the Supreme Court of the State of New York, by its "ordinary jurisdiction as prescribed by local laws is appropriate to the occasion." (*Missouri* v. *Taylor*, 266 U. S. 200.)

We do not contend that Congress can create jurisdiction in a state court or compel a state to organize and maintain a court with the necessary jurisdiction to try these actions. The court must exist and have jurisdiction. If the court exists and has jurisdiction, Congress may enforce the exercise of its jurisdiction. (Article 6 and Article 1, Section 8, U. S. Constitution.)

To illustrate: The County Courts of the State of New York have jurisdiction only to the extent of $3,000, where the defendant is a resident of the County and a natural person or domestic corporation, but in no case may a foreign corporation be sued in said courts, whether or not it is doing business within the State of New York, or the County in which the action is sought to be maintained. (Article 6, Section 14, N. Y. Constitution, 1894; N. Y. Civil Practice Act, Sec. 67; *Wachtel* v. *Diamond Corp.*, 215 App. Div. 15; etc.). The Congress could not compel such courts to take jurisdiction of this action.

The same general principle applies to City Courts and Municipal Courts which are all courts of confessedly limited jurisdiction whereas the Supreme Court of New York is a court of general jurisdiction.

Our Supreme Court is a court of general jurisdiction, in law and equity, derived from its original crea-

tive act of 1691 and the consolidation or merger of the Courts of Chancery and the several Superior Courts of the various cities of the State of New York, all of which were abolished by various Constitutions of the State of New York, and all of whose jurisdiction was merged into the New York Supreme Court, and which latter Court, by the present Constitution of 1894, cannot have its jurisdiction limited in any way except by the adoption of a new Constitution. (N. Y. Constitution, Article 6, Section 1.)

Therefore, for Congress to enact a statute specifically conferring upon the New York Supreme Court concurrent jurisdiction (a jurisdiction it already possessed until limited by Congress) with the federal courts in an action brought pursuant to said statute is simply compelling the New York Supreme Court and the Judges of said Court to honor their oaths and obey Article 6 of the United States Constitution and adjudicate the rights of the parties under the rules and provisions of the federal act in an ordinary tort action similar to any other tort action triable in said court, except insofar as the federal act changes the rules and provisions of the common law and the statutes of New York, which would otherwise be applicable to such an action if it were not for the fact that different rules have been prescribed by the Federal Congress. The mere fact that different rules have been prescribed is immaterial. (*Mondou* v. *N. Y. N. H. & H. R. R. Co.*, 223 U. S. 1.) It is a court's duty to adjudicate the rights of parties litigant in any action over which it has jurisdiction of the subject matter and of the parties.

There should be no question but that Congress may burden interstate commerce so long as the burden is uniform and does not violate the Seventh Amendment of the Federal Constitution. The present act applies

to all common carrier railroads with the same force and effect and has been held to deprive none of any Constitutional right. (Second Federal Employer's Liability Cases, 223 U. S. 1.)

Exclusive power to legislate over a given subject carries with it the incidental power to burden and regulate, such as to enact uniform legislation covering all actions given by said act. In the instant case the two most important of which are the extension to the plaintiff of three venues in which to bring his action and the prohibition of removal of such action when brought in a state court from the state to the federal court, either as matter of right or as matter of discretion on the ground of a diversity of citizenship or for any other reason.

It seems to us that this latter burden upon interstate commerce is the burden which the respondent has and is attempting to charge to Subdivision 4 of Section 47 of the General Corporation Law of the State of New York, when it contends that because said subdivision authorizes an action in the New York Supreme Court where a foreign corporation is doing business within the State of New York, such authorization is a burden upon interstate commerce.

We ask with all sincerity how Subdivision 4 of Section 47 of the General Corporation Law of New York can possibly burden interstate commerce in the instant case when the Federal Congress has decreed that an action, such as the one in the case at bar, may be maintained as of right in the Southern District of New York, which district includes the Counties of New York, Bronx and Westchester, where the defendant is actually doing business, and where this action was instituted under the concurrent provisions of the Federal Act in a State Court sitting within said District and not

more than twenty-five miles away from the present site of the District Court for the Southern District of New York.

To carry the argument one step further, petitioner could have brought this action in the New York Supreme Court in New York County. If this had been done the Federal Court would have been located on one side of City Hall Park and the State Court on the other.

All the Legislature of New York did when it added Subdivision 4 to Section 47 of the General Corporation Law in 1913, as said law then existed in Section 1780 of the Code of Civil Procedure, was to amend the general law of the State of New York applicable alike to all foreign corporations, whether they be engaged in interstate commerce or not, or have agents designated to accept service of process in New York or not, and made said corporations answerable in our courts if service of process could be obtained upon them when they were actually doing business within the State of New York. No attempt was made to deprive any of said corporations of the right to defend in New York Courts or to prohibit removal of any action from the state court to the federal courts. (*Mahar* v. *Harrington Park Villa Sites*, 204 N. Y. 231). The legislature simply said that if a foreign corporation does business in New York, a suit against it may be maintained in the Courts of New York, and in these respects the New York Statute differs from all statutes heretofore adjudicated by this Court and held to create burdens upon interstate commerce.

(b) In dealing with the last question, the power of the Legislature to change general laws and whether or not such a change violates the obligation of an al-

leged contract, we will simply refer to some general and well-settled fundamental principles of law.

What constitutional right does a foreign corporation acquire by receiving permission to do business in a state other than its creation to successfully object to a change in the state's general laws? A citizen of the state has no constitutional guarantee that the general laws will remain unchanged (*Pennie* v. *Reis*, 132 U. S. 464; *People* v. *Coler*, 173 N. Y. 103), and a foreign corporation may be denied the privilege of doing business in a particular state. (*Hooper* v. *California*, 155 U. S. 648, and cases cited in said opinion.) At the best such permission is only a matter of comity between the several states. (*Connecticut Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322). Such permission, by the weight of federal authority, is a revocable license or privilege subject to change. (Cases, *supra*.) True, the consent filed by the respondent was a contract, but such contract is subject to the construction placed thereon by the Court of Appeals (*Bagdon* v. *Phil. and Reading Coal and Iron Co.*, 217 N. Y. 432; *Penn. Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93; *New York, L. E. & W. R. Co.* v. *Estell*, 147 U. S. 591; *The Eliza Lines*, 199 U. S. 119). A change in general laws does not violate the obligation of such contract where the change does not deprive the respondent of due process of law (*Hays* v. *Seattle*, 251 U. S. 233). An agent or officer designated for the purpose is here to accept service though the cause of action has no relation to the business transacted in the State of New York. (*Barrow S. S. Co.* v. *Kane*, 170 U. S. 100).

As far as the respondent's interstate commerce business is concerned, it could and now can conduct such business and maintain its agents in the State of New

York for the transaction of such interstate business (*Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282) without the necessity of having a designated agent within the State for the service of process. (*International Fuel & Ice Corp.* v. *Downer Steel Co.*, 242 N. Y. 224.) The service of process could be made upon the defendant by the use of a writ of attachment, and the mere fact that it now finds itself sued in the New York Supreme Court by a citizen of the State of its creation, under authority of a Federal Statute regulating interstate commerce, seems to us a poor excuse for attempting to attack a change in the general laws of the State of New York on the ground that the change violates the obligation of a contract, when the alleged contract was merely at best a revocable license and the change placed no burden upon interstate commerce that had already not been placed there by the Federal Congress.

The Federal Congress said that the action "may be maintained in the district in which the defendant is doing business." The State act says that the action may be maintained "where a foreign corporation is doing business within this state." And the respondent never has and never can successfully contend that it is not actually conducting business (interstate and intrastate) in the State of New York every day of the year. (*Penn. Collieries Co.* v. *McKeever*, 183 N. Y. 98; *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171).

In Conclusion.

It seems to the petitioner that for this Court to sustain the judgment below is but to extend the principles of a doctrine of state comity to the relation of the Federal Government in its dealings with the several

states; to deprive a citizen of a free government of one of his most sacred and fundamental rights, the right to resort to one of the courts of a harmonious judicial system as of right for an adjudication of whatever rights he may have; to place a strained judicial interpretation upon the words resident and non-resident as used in Sections 46 and 47 of the General Corporation Law of New York, and lastly for this Court to substitute its judicial discretion for the legislative wisdom and authority of the Federal Congress concerning a matter (interstate commerce) over which subject the Federal Congress has always been the acknowledged authority when it has sought to exercise its powers and such exercise has not violated the Federal Constitution.

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